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INDEX

Page

Adell Broadcasting Corp.; re Review Board affirmed ALJ's grant, BC Docket No. 80-471, (FCC 84R-76) 477

Adell Broadcasting Corp.; re Applications for construction permit for new TV broadcast station, BC Docket No. 80-471, (FCC 84D-12).......... 485

Alessandro B/cing Company; re Review Board affirmed ID's grant of AM Application, MM Docket No. 83-249, (FCC 84R-71) 1

Alessandro B/cing Company; re Applications for construction permit, MM Docket No. 83-249, (FCC 84D-20).......... 12

Amendment of Part 31; re *Report and Order* establishes new accounts to record carriers' access revenues & expenses, BC Docket No. 83-1347, (FCC 84-486).......... 58

Amendment of Part 76; re Cable systems may operate on aeronautical radio frequencies if certain requirements are met, Docket No. 21006, (FCC 84-516). 512

Amendment of Part 76; re Most records requirements for public inspection files eliminated, MM Docket No. 82-813, (FCC 84-590).......... 959

Amendment of Section 73.3597; re One year holding period for licenses obtained under Minority Ownership Policy, BC Docket No. 81-897, (FCC 84-528) 971

American Christian TV System, Inc.; re Application for review of Bureau's action denied, (FCC 84-429).......... 542

American Christian TV System, Inc.; re Application for review of Bureau's action granted to an extent and denied otherwise, (FCC 84-430) 547

AM Stations in Alaska; re Protection Standards, MM Docket No. 83-807, (FCC 84-489).......... 77

Apogee, Inc.; re Review Board reversed ALJ's grant and awarded it to competing Applicant. BC Docket No. 82-195, (FCC 84R-98) 979

Apogee, Inc.; re Applications for construction permit, BC Docket No. 82-195, (FCC 84D-8) 992

AT&T Co.; re Order denied petition for stay, CC Docket No. 83-1375, (FCC 84-442) 551

AT&T Co.; re Third Report of staff audit, (FCC 84-484) 94

Page

AT&T Co.; re Order denies petitions to revise depreciation rates, (FCC 84-505) .. 117

Bellar Communications, Inc.; re *Memorandum Opinion and Order* adopted affirming decision of Private Radio Bureau, (FCC 84-593) 557

California Broadcasting Corp.; re Review Board denied motion for emergency relief, BC Docket No. 80-698, (FCC 84R-77) 562

Cascade Video of Oregon, Ltd.; re Review Board remanded proceeding on misrepresentation issues, BC Docket No. 82-254, (FCC 84R-49) 1001

Cascade Video of Oregon, Ltd.; re Applications for construction permit, BC Docket No. 82-254, (FCC 83D-68) 1009

CBS, Inc.; re Applications for Interim Direct B/c Satellite Systems, (FCC 84-477) 564

Christian B/cing of Midlands, Inc.; re Review Board awards permit to competitor having moderate to substantial coverage preference, BC Docket No. 81-178, (FCC 84R-78) 578

Christian B/cing of Midlands, Inc.; re Applications for construction permit for new TV station, BC Docket No. 81-178, (FCC 84D-23) 585

City of Kerrville; re Application for review denied, (FCC 84-464) 124

Competitive Carrier Services; re *Sixth Report and Order* adopted, CC Docket No. 79-252, (FCC 84-566) 1020

COMSAT; re Petitions for reconsiderations of 97 FCC 2d 145 denied, CC Docket No. 80-634 (FCC 84-565) 1040

Customer Premises Equipment; re *Fourth Report and Order* adopted, CC Docket No. 81-893, (FCC 84-511) 128

Customer Premises Equipment; re National Security and emergency preparedness communications, CC Docket No. 81-893, (FCC 84-652) 1066

Daytime AM B/C Station; re Section 73.99 amended adjusting transmission power, BC Docket No. 82-538, (FCC 84-591) 1087

Depreciation Rates; re Order prescribes depreciation rates for Indiana Bell, South Central Ill. Bell, Chesapeake & Potomac Teleph. Companies, etc., (FCC 84-620) 1094

Depreciation Rates; re Order prescribes depreciation rates for General Teleph. Companies of Southeast & Southwest, Ohio Bell, Pacific Bell Teleph, etc., (FCC 84-621) 1128

Depreciation Rates; re Order prescribes depreciation rates for Bell Teleph. of Penn. Hawaiian, Diamond State, New Jersey Bell Teleph. etc., (FCC 84-622) .. 1148

Faith Center, Inc.; re Third request for distress sale relief conditionally granted, BC Docket No. 80-730, (FCC 84-613) 1164

Garnerlynn Communications; re Application for review denied, (FCC 84-614) 1176

Gene Sudduth Co., Inc.; re Review Board grants appeal and sets aside ALJ's order, MM Docket No. 84-589, (FCC 84R-66) 137

Page

Grand Radio, Inc.; re Review Board remands proceeding, BC Docket No. 80-717, (FCC 84R-75) 596

Hampshire County B/cing Co., Inc.; re Review Board affirmed ALJ's grant, BC Docket No. 81-159. (FCC 84R-92) 600

Hampshire County B/cing Co., Inc.; re Applications for construction permit for new FM station, BC Docket No. 81-159, (FCC 84D-24) 608

Hispanic Owners, Inc.; re Decisive Section 307(b) preference denied, applicant proposing 100% full-time integration preferred, BC Docket No. 82-570, (FCC 84R-97) 1180

Hispanic Owners, Inc.; re Applications for construction permit for new FM Station, BC Docket No. 82-570, (FCC 84D-39) 1194

Holston Valley B/cing Corp.; re Application for review denied, (FCC 84-453) 142

Interconnection Arrangements; re Commission rescinds existing prescriptions, CC Docket No. 82-122, (FCC 84-523) 146

Jerome Thomas Lamprecht; re Review Board affirmed ALJ's choice of applicant, MM Docket No. 83-985, (FCC 84R-93) 1219

Jerome Thomas Lamprecht; re Applications for construction permit for new FM station, MM Docket No. 83-985, (FCC 84D-42) 1229

Katy Communications, Inc.; re Application for review denied, (FCC 84-536) 677

Kinetications, Inc.; re Application for review denied, (FCC 84-454) 169

Kist Corp.; re Review Board affirmed ALJ's grant, BC Docket No. 81-863, (FCC 84R-74) 173

Kist Corp.; re Applications for television construction permit, BC Docket No. 81-863, (FCC 83D-60) 201

Las Manzanas Television Company; re Application for review denied, (FCC 84-570) 1241

Merrimack Valley B/cing, Inc.; re Petition for reconsideration of Commission Order affirming Review Board's decision, granted in part & dismissed in part, BC Docket 80-28, (FCC 84-496) 680

Metrogeneral Communications of Nashville, Inc.; re License renewal application deferred pending review and petition to deny denied, (FCC 84-354) 256

Metro Broadcasting, Inc.; re Review Board reversed *ID's* disqualification of applicant and granted its TV application, MM Docket No. 83-140, (FCC 84R-85) 688

Minority B/cers of East St. Louis, Inc.; re Review Board affirmed Initial Decision and granted new TV applicant, BC Docket No. 82-378, (FCC 84R-45) 264

Minority B/cers of East St. Louis, Inc.; re Applications for television construction permit, BC Docket No. 82-378, (FCC 83D-63) 277

Minority Ownership in B/cing; re Commission declined to adopt proposed change in Rule 73.1150, GEN. Docket No. 82-797, (FCC 84-647) 1249

Page

MTF Enterprises; re Review Board affirmed *ID* and granted FM application, MM Docket No. 83-646, (FCC 84R-69) 297

MTF Enterprises; re Applications for construction permit for new FM station, MM Docket No. 83-646, (FCC 84D-22) 304

MTS/WATS; re Section 69.303(c) of Rules amended, CC Docket No. 78-72, (FCC 84-545) 708

Operational-Fixed Service; re Petitions for reconsideration of *First Report and Order*, 86 FCC 2d 299, denied, Docket No. 19671, (FCC 83-245) 715

Pillar of Fire; re Review Board affirmed *ID* grant of renewal applicant, BC Docket No. 82-471, (FCC 84R-95) 1256

Pillar of Fire; re Applications for construction permit, BC Docket No. 82-471, (FCC 84D-36) 1290

Public Land Mobile Service; re Commission eliminated separate frequency allocation structure 22.501, CC Docket No. 83-1146, (FCC 84-485) 311

Reduced Orbital Spacing; re Petitions for reconsideration granted to an extent and denied in all other respects, CC Docket No. 81-704, (FCC 84-487) 737

Revision of Parts 2 and 18; re *Third Notice of Proposed Rule Making* adopted, GEN Docket No. 20718, (FCC 84-578) 750

Rochelle C. Salzer; re Application for review denied, (FCC 84-455) 331

Ron Culpepper; re Complaint against TV station KCPQ, (FCC 84-520) 778

Ruarch Associates; re Section 307(b) preference denied and CP granted to applicant for ownership integration proposal, MM Docket No. 83-843, (FCC 84R-73) 338

Ruarch Associates; re Applications for construction permit for new FM station, MM Docket No. 83-843, (FCC 84D-25) 345

Santee Cooper B/cing Co.; re Review Board affirmed *ID's* FM construction permit grant, MM Docket No. 83-158, (FCC 84R-87) 781

Santee Cooper B/cing Co.; re Applications for construction permit for new FM, MM Docket No. 83-158, (FCC 84D-38) 806

Satellite Syndicated Systems, Inc.; re Authority to establish interim direct b/c satellite systems, (FCC 84-608) 1369

South Florida B/cing Company, Inc.; re Proceeding remanded on site availability issue, BC Docket No. 82-731, (FCC 84R-89) 840

South Florida B/cing Company, Inc.; re Applications for construction permit for new FM station, BC Docket No. 82-731, (FCC 84D-30) 850

Syracuse Peace Council; re Establishing violation of the Fairness Doctrine, (FCC 84-518) 1389

Technical Regulations; re *Report and Order* adopted, GEN Docket No. 83-114, (FCC 84-521) 903

Page

Telecommunications Equipment; re *Third Report and Order* adopted, CC Docket No. 81-893, (FCC 84-483) 354

Texas Broadcast Stations; re Petition to deny certain license renewal applications dismissed and/or denied, (FCC 84-494) 377

Valley FM Radio; re Review Board affirmed ALJ's grant, BC Docket No. 80-379, (FCC 84R-86) 924

Valley FM Radio; re Applications for construction permit for new FM station, BC Docket No. 80-379, (FCC 84D-34) 930

Vincent J. Beard; re Amateur licensee cheated on Morse code examination, PR Docket No. 83-1065, (FCC 84R-80) 943

Vincent J. Beard; re License for Station N2EDW revoked, Technical Class License suspended and General Class Operator license denied, PR Docket No. 83-1065, (FCC 84D-27) 947

Washington's Christian TV Outreach; re Review Board affirmed ALJ's grant, BC Docket No. 81-528, (FCC 84R-70) 395

Washington's Christian TV Outreach; re Applications for construction permit, BC Docket No. 81-528, (FCC 84D-18) 428

WFSP, Inc.; re Applicant with no media holdings receives substantial and decisive preference, MM Docket No. 83-689, (FCC 84R-64) 444

WFSP, Inc.; re Applications for construction permit for new FM station, MM Docket No. 83-689, (FCC 84D-31) 448

WRLJ, Inc.; re Review Board affirmed Initial Decision and granted applicant with minority participation in management, BC Docket No. 82-312, (FCC 84R-43) 460

WRLJ, Inc.; re Applications for construction permit for new FM station, BC Docket No. 82-312, (FCC 84D-11) 463

Subject Digest

Accounting/Cost Allocation Practices

Memorandum Opinion and Order adopted denying petitions for reconsideration for the Second Comsat Structure Order, 97 FCC 2d 145. Order retains current policy of permitting Comsat to engage in competitive (nonjurisdictional) activities through structurally separated subsidiaries. Order also grants in part the petition for reconsideration filed by Comsat. Order authorizes Comsat to employ a "gross operating expenses" formula.

—COMSAT

CC Docket No. 80-634

AM Station, Operating Hours

Section 73.99 of the Commission's Rules amended to adjust the power Class III daytime-only AM stations are able to use during post-sunset operation. Proceeding terminated.

—Daytime AM B/C Station

BC Docket No. 82-538

Application, Acceptance of

A major amendment to a pending low power television or television translator application to change technical specifications to avoid interference to an authorized facility was permissible during the 90-day amendment period as set forth in the June 23, 1982 *Public Notice.*

—Las Manzanas TV Co.

Application, Defective

Application for review denied. A low power television or television translator application which is found to cause interference to an existing television translator station is defective and unacceptable for filing.

—Las Manzanas TV Co.

Application for review denied. Low power television interference rules provide that an applicant must explicitly specify one of the three possible frequency offsets in order for its application to be considered as proposing frequency offset operation. A low power television application which is predicted to cause interference to an existing full service television station is defective and unacceptable for filing.

—Garnerlynn Communications

Application, Processing of

While low power television rulemaking was pending, action on mutually exclusive applications was deferred but applications that were not mutually exclusive were processed to grant. Low power television or television translator authorizations made during the pendency of low power television rulemaking will not be re-examined using interference prediction criteria established by that rulemaking for new and pending CP applications.

—Las Manzanas TV Co.

Application, Unacceptable

(See: Satellite, Direct Broadcast-*Satellite Syndicated Systems, Inc.*)

Broadcast License, Property Right of

Commission declined to adopt proposed change in Rule 73.1150. Allowing a seller-creditor to retain an automatic reversionary interest in the license in a seller-financed sale of a broadcast property to a minority buyer is barred by statute.

—Minority Ownership in B/cing
GEN. Docket No. 82-797

CATV Annual Fee

Commission has eliminated rule requiring cable television operators to retain records of subscribers served and to make them available to Commission upon request. Since cable fees are no longer collected, subscriber data upon which to base such fees are no longer necessary.

—Amendment of Part 76
MM Docket No. 82-813

CATV Records for Public Inspection

Commission has eliminated most of the records which cable TV systems have been required to retain in their public inspection files. Cable operators remain obliged to retain in their public inspection files records required by Sections 76.205(d) (origination cablecasts by candidates for public office), 76.221(f) (sponsorship identification) and 76.311(j) (equal employment opportunities).

—Amendment of Part 76
MM Docket No. 82-813

Common Carrier

Commission adopted *Sixth Report and Order* creating a framework for provision of customer premises equipment associated with national security and emergency preparedness communications.

—Customer Premises Equipment

CC Docket No. 81-893

Common Carrier, Authorization

Sixth Report and Order adopted regarding policy and rules concerning rates for competitive common carrier service and facilities authorizations.

—Competitive Carrier Services

CC Docket No. 79-252

Common Carrier, Rates, Charges

(See: Common Carrier, Authorization-*Competitive Carrier Services*)

Comparative Criteria

Decisive Section 307(b) preference is not awarded where all applicants for high-powered Class C FM station would serve the entire Albuquerque urbanized area as a whole. Under contingent comparative issue, applicant proposing 100% full-time integration and having no diversification demerit preferred.

—Hispanic Owners, Inc.

BC Docket No. 82-570

Where three of four broadcast applicants propose 100% quantitative ownership integration, the comparative analysis focuses on relative qualitative enhancement credit, and Review Board affirmed ALJ's choice of applicant. No diversification demerit assessed for relationship with advertising and consulting firm or for post cut-off purchase and divestiture commitment within 30 days, and residence credit does not require full-time habitation.

—Jerome Thomas Lamprecht

MM Docket No. 83-985

Comparative Renewal

Review Board affirmed *ID* grant of renewal applicant in comparative hearing after finding that licensee methodically ascertained, and responded to, community needs; regularly broadcast news and public affairs; gave "fair break" to other religions despite its own fundamentalist orientation; and thus deserved strong preference for past performance.

—Pillar of Fire

BC Docket No. 82-471

Competition, Common Carriers
(See: Common Carrier, Authorization-*Competitive Carrier Services*)

COMSAT
(See: Accounting/Cost Allocation Practices-*COMSAT*)

Coverage, Issue
In hearing matter of five mutually exclusive applications for a new commercial television station in Hammond, Indiana, Review Board reversed ALJ's grant and awarded it to a competing applicant. Board diminished ALJ's winner's quantitative integration credit on ground it was nonmanagerial and enhanced comparative coverage preference given to eventual winner.
—Apogee, Inc.
BC Docket No. 82-195

Customer Premises Equipment
(See: Common Carrier-*Customer Premises Equipment*)

Daytime Station
(See: AM Station, Operating Hours-*Daytime AM B/C Station*)

Depreciation Rates
These Orders will prescribe depreciation rates for the telephone companies and accounts/subaccounts shown in Appendices to the Orders.
—Depreciation Rates

Deregulation
(See: CATV Annual Fee-*Amendment of Part 76*)

(See Also: CATV Records for Public Inspection-*Amendment of Part 76*)

Distress Sale
Commission extended one year holding period to licenses obtained under Minority Ownership Policy, but refused to extend it to incumbent licensees who succeed in obtaining renewal in a comparative hearing. In addition, Commission adopted general exception to holding period for any applicant desiring to sell to a minority-owned or controlled entity in furtherance of Minority Ownership Policy.
—Amendment of Section 73.3597
BC Docket No. 81-897

Third request for distress sale relief conditionally granted. Proposed buyer controlled by 21% Hispanic owner. Sale meets standards of

revised distress sale policy statement. 92 F.C.C. 2d 849 (1982). If conditions to sale not met, licensee must file supplemental renewal application, against which new applicants may file during 90-day "open window"; licensee would then be designated for comparative hearing.
—Faith Center, Inc.
BC Docket No. 80-730

Diversification of Control of Mass Media
Review Board remanded proceeding on misrepresentation issues to explore genuineness and permanence of applicant's ownership integration proposal in light of charges that station will be syndicated out and/or professionally managed by others. Theatre and broadcast interests of applicants are cross-cancelling or warrant only a very slight preference, and assumption is rejected that husband and wife will jointly vote separate stock for majority integration control.
—Cascade Video of Oregon, Ltd.
BC Docket No. 82-254

(See Also: Comparative Criteria-*Jerome Thomas Lamprecht*)

(See Also: Broadcast License, Property Right of-*Minority Ownership in B/cing*)

Fair Break Doctrine
(See: Comparative Renewal-*Pillar of Fire*)

Fairness Doctrine, Licensee Obligation
If a complainant establishes that the issue involved is both controversial and of public importance, the broadcast presented a viewpoint on one side of this controversial issue of public importance and the licensee's overall coverage of the issue was imbalanced, it has established that the licensee is in violation of the Fairness Doctrine.
—Syracuse Peace Council

Frequency Equitable Distribution of Under 307(b)
(See: Comparative Criteria-*Hispanic Owners, Inc.*)

Frequency Offset Rules
(See: Application, Defective-*Garnerlynn Communications*)

License, Property Rights in
(See: Broadcast License, Property Right of-*Minority Ownership in B/cing*)

Minority Ownership of B/C Facilities
(See: Distress Sale-*Amendment of Section 73.3597*)
(See also: Distress Sale *Faith Center, Inc.*)

Misrepresentation
(See: Diversification of Control of Mass Media-*Cascade Video of Oregon, Ltd.*)

Misrepresentation, Character Qualification
(See: Coverage, Issue-*Apogee, Inc.*)

Mutual Exclusivity

DBS applications are not mutually exclusive where there are sufficient channels for all applicants, even though an applicant may not receive requested channels. DBS systems will be approved proposing power lower than that assumed for international planning purposes where it is demonstrated that the signal will be adequate reception by small, relatively inexpensive receive units. Systems proposing even lower power and failing to make a convincing demonstration will not be approved.
—*Satellite Syndicated Systems, Inc.*

National Defense
(See: Common Carrier-*Customer Premises Equipment*)

Offset Requirements
(See: Application, Defective-*Garnerlynn Communications*)

Operation, Hours of Daytime-only
(See: AM Station, Operating Hours-*Daytime AM B/C Station*)

Ownership Minority
(See: Distress Sale-*Amendment of Section 73.3597*)
(See Also: Broadcast License, Property Right of-*Minority Ownership in B/cing*)

Ownership and Management, Integration of
(See: Coverage, Issue-*Apogee, Inc.*)
(See Also: Diversification of Control of Mass Media-*Cascade Video of Oregon, Ltd.*)
(See Also: Comparative Criteria-*Jerome Thomas Lamprecht*)

Post-Sunset Operation
(See: AM Station, Operating Hours-*Daytime AM B/C Station*)

Power Equipment, Auxiliary
(See: Coverage, Issue-*Apogee, Inc.*)

Programming Discrimination in
(See: Comparative Renewal-*Pillar of Fire*)

Programming Religious
(See: Comparative Renewal-*Pillar of Fire*)

Remand
(See: Diversification of Control of Mass Media-*Cascade Video of Oregon, Ltd.*)

Renewal of License, Conditional
(See: Distress Sale-*Faith Center, Inc.*)

Satellite Communications
(See: Accounting/Cost Allocation Practices-*COMSAT*)

Satellite, Direct Broadcast
(See: Mutual Exclusivity-*Satellite Syndicated Systems, Inc.*)

(See Also: Application, Unacceptable-*Satellite Syndicated Systems, Inc.*)

Colocation of DBS satellites is permitted despite nonconformance with international plan, where it is shown that interference will not exceed tolerances provided in the international plan. Due to spectrum utilization concerns, such authorization will not have renewal expectancy, but will be reconsidered at time of renewal based on circumstances at that time.
—*Satellite Syndicated Systems, Inc.*

Signal Strength
(See: Mutual Exclusivity-*Satellite Syndicated Systems, Inc.*)

Station, Sale of
(See: Distress Sale-*Amendment of Section 73.3597*)

Sunset
(See: AM Station, Operating Hours-*Daytime AM B/C Station)*

Structural Separation
(See: COMSAT-*COMSAT*)

Television, Low Power
(See: Application, Defective-*Garnerlynn Communications*)

(See Also: Application, Acceptance of-*Las Manzanas TV Co.*)

Transfer of Control
(See: Distress Sale-*Amendment of Section 73.3597*)

Translator
(See: Application, Acceptance of-*Las Manzanas TV Co.*)

Power Equipment, Auxiliary
(See: Coverage-*Dave [illegible], Inc.*)

Programming, Discrimination in
(See: Comparative Renewal-*Pillar of Fire*)

Programming, Religious
(See: Comparative Renewal-*Pillar of Fire*)

Remand
(See: Diversification of Control of Mass Media-*Cascade Video of Oregon, Ltd.*)

Renewal of License, Conditional
(See: Distress Sale-*Faith Center, Inc.*)

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(See: Accounting/Cost Allocation Practices-*COMSAT*)

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—*Satellite Syndicated Systems, Inc.*

Signal Strength
(See: Mutual Exclusivity-*Satellite Syndicated Systems, Inc.*)

Station, Sale of
(See: Distress Sale-*Amendment of Section 73.3597*)

Sunset
(See: AM Station, Operating Hours-*Daytime AM B/C Station*)

Structural Separation
(See: COMSAT-*COMSAT*)

Television, Low Power
(See: Application, Defective-*[illegible] Communications*)

CATV Annual Fee
Deregulation

Commission has eliminated rule requiring cable television operators to retain records of subscribers served and to make them available to Commission upon request. Since cable fees are no longer collected, subscriber data upon which to base such fees are no longer necessary.
—*Amendment of Part 76*
MM Document No. 82-813

CATV Records for Public Inspection
Deregulation

Commission has eliminated most of the records which cable TV systems have been required to retain in their public inspection files. Cable operators remain obliged to retain in their public inspection files records required by Sections 76.205(d) (origination cablecasts by candidates for public office), 76.221(f) (sponsorship identification) and 76.311(j) (equal employment opportunities).
—*Amendment of Part 76*
MM Docket No. 82-813

FCC 84-590

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Amendment of Part 76 of the Commission's Rules and Regulations Relative to the Obligations of Cable Television Systems to Maintain Public Inspection Files and Retain Subscriber Records.	MM Docket No. 82-813

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 30, 1984; Released: February 8, 1985

BY THE COMMISSION:

Introduction

1. On December 8, 1982, the Commission adopted a *Notice of Proposed Rule Making* ("*Notice*") in this proceeding.[1] The *Notice* proposed to eliminate or simplify the provisions of Section 76.305 of the Commission's Rules, which require that various records be maintained locally by cable television system operators for public inspection.[2] Also proposed for revision or deletion was Section 76.306, which requires cable operators to retain certain subscriber records.

2. Specifically, Section 76.305 of the rules obliges each system operator to retain, and make locally available, copies of: its local franchise application; its application for a Certificate of Compliance; petitions to and rulings from the Commission concerning the system; its completed FCC Form 325; any application for transfer of control of a Cable Television Relay Station; records relating to network program nonduplication agreements, subscription cablecasting, political cablecasts, sponsorship identification, and equal employment opportunities; and, the system's registration statements. As stated in the *Notice,* these requirements, as well as those of Section 76.306, are being reassessed. In so doing, we seek to meet our obligation to review those rules which may no longer serve their intended purpose and which therefore are no longer necessary.

Background

3. In our 1972 *Cable Television Report and Order*,[3] we established a comprehensive regulatory program for cable television. A basic feature of that program was the certification process, which resulted in the award by the Commission of a Certificate of Compliance ("CAC"). The process was intended to assure that the Commission received detailed information from systems concerning their proposed operations; it also enabled the Commission to verify that systems were in compliance with its rules.

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[1] 48 Fed. Reg. 844 (January 7, 1983).

[2] Section 76.305 lists the records to be placed in a system's public inspection file in paragraphs (a)(1)-(a)(4) and (a)(6)-(a)(9). Section 76.305(a)(5) was deleted by Commission action in 1980. *Report and Order* in Docket Nos. 20988 and 21284, 79 F.C.C. 2d 663, 890 (1980), *aff'd Malrite TV of New York, Inc. v. FCC,* 652 F.2d 1140 (2d Cir. 1981), *cert. denied,* 454 U.S. 1143 (1982). Only those parts of Section 76.305(a)(7), however, addressed to subscription cablecasting records and network program nonduplication agreements are before us and are considered herein. No action was proposed in the *Notice,* and none is taken herein, affecting those parts of paragraph (a)(7) relating to equal employment opportunities, political cablecasts, or sponsorship identification records. Thus, our action today does not alter cable operators' continuing obligation to maintain copies in their public inspection files of records required to be kept by Sections 76.205 (origination cablecasts by candidates for public office); 76.221 (sponsorship identification); and 76.311 (equal employment opportunity). *See* Appendix B *infra.*

[3] *Cable Television Report and Order,* 36 F.C.C. 2d 143 (1972).

4. Section 76.305 of the Commission's Rules was promulgated in 1974.[4] The Commission, in requiring that cable systems make the designated disclosures to the public, observed that the public needed to have at least basic information about a system's operations and proposals in order for it to play any role in the regulation of cable television. The Commission expected that local citizens would take advantage of opportunities to participate directly in the certification process and in other cable television proceedings. Accordingly, the promulgation of Section 76.305 guaranteed the public local access to information that complemented that which was available to the Commission through the certification process itself.[5]

5. Since the above actions were taken, cable television has been significantly deregulated by the Commission. For instance, the requirement that local and state authorities be governed by and defer to Commission standards in the franchising process has been deleted, and cable systems no longer have to provide the Commission with a statement "explaining how a system's franchise is consistent with federal standards."[6] Similarly, the certification requirement was discarded and replaced with a simpler, more straightforward registration process which reduces an operator's burdens and facilitates speedier delivery of service to subscribers.[7] Rules obliging cable systems to provide the public with access to cable channels have been discontinued,[8] and rules requiring cable systems to engage in mandatory program origination have been deleted.[9] Finally, rules restricting a cable system's carriage of distant broadcast television signals and proscribing retransmission of certain distant signal programming in accordance with syndicated exclusivity regulations have also been eliminated.[10] Thus, as a result of both Commission and court action, the original 1972 cable television regulatory program is no longer in effect.

6. The role of the Commission in cable matters has been further clarified by the enactment on October 31, 1984, of the Cable Communications Policy Act of 1984 ("Cable Act"). In establishing a national policy

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[4] *Report and Order* in Docket No. 19948, 48 F.C.C. 2d 72 (1974).

[5] Section 76.306 of the Commission's Rules was also adopted in 1974. *Memorandum Opinion and Order*, 39 Fed. Reg. 9442 (March 11, 1974). The requirement that cable television systems maintain specified subscriber records was imposed to assure the availability of data needed to assist the Commission in verifying proper calculation of the annual cable fee.

[6] *Report and Order* in Docket No. 21002, 66 F.C.C. 2d 380, 383 (1977).

[7] *Report and Order* in CT Docket No. 78-206, 69 F.C.C. 2d 697 (1978).

[8] *Midwest Video Corp. v. FCC,* 571 F.2d 1025 (8th Cir. 1978), *aff'd* 440 U.S. 689 (1979).

[9] *Report and Order* in Docket No. 19988, 49 F.C.C. 2d 1090 (1974).

[10] *Report and Order* in Docket Nos. 20988 and 21284, 79 F.C.C. 2d 652 (1980), *aff'd Malrite TV of New York, Inc. v. FCC,* 652 F.2d 1140 (2d Cir. 1981), *cert. denied,* 454 U.S. 1143 (1982).

governing various aspects of cable communications, the Cable Act makes the local franchising authority the focal point of regulation directed to such local incidents of cable service as the selection of a cable franchisee and franchise modification and renewal.[11] Thus, the Cable Act essentially codifies existing Commission practice in this area.[12]

Comments

7. In response to the *Notice*, comments have been received from cable systems, cablecasting networks, cable trade associations, a state franchising authority, and one public interest organization. With the exception of the United Church of Christ ("UCC"), all commenters supported the Commission's proposals.[13]

8. The cable parties filing in this proceeding represented approximately 410 systems, serving at least 523 communities in all regions of the United States. These commenters generally indicated that the public inspection file was infrequently utilized. To support this conclusion, some of the parties conducted surveys of public demand for information in the local files. One such commenter, the North Carolina CATV Association, representing 70 systems in that state, reviewed the 12-month period from February 1982 through February 1983. During that time period, only one system received a request from the public for access to its file. Also, as reported by Americable Associates, only four requests to inspect the public file were made of 25 systems during a combined total of 67 system years. In addition, Storer Broadcasting noted that in the experience of eight of its senior system managers, the public files had only been used by FCC inspectors or Storer personnel, never by the public.

9. The commenting parties also addressed the issue of the financial burden imposed by the public file requirement. With the exception of UCC, commenters were unanimous in citing the high costs of complying with Section 76.305(a). These parties noted that funds have to be expended to train personnel, for use of employees' time to gather and compile inspection file data, for photostating and mailing copies to affiliated systems, and for file space. Commenters found this paperwork particularly burdensome for small, one or two-system companies and for cable companies maintaining many franchises within one geographical area. They concluded that, given the negligible usage of the local file by the public, these substantial burdens are not warranted.

10. In supporting the retention of Section 76.305, UCC argued that a federally mandated recordkeeping system is necessary to compensate for

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[11] *See* Sections 621, 625, and 626 of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. (1984).

[12] The Cable Act makes no provision concerning public inspection files, although it does require the retention and public availability of EEO records.

[13] A list of the parties filing comments is contained in Appendix C.

nonexistent, inefficient, excessively diversified, or inconsistent public information requirements imposed by state and local authorities. Otherwise, argued UCC, the public will be seriously burdened in any search for cable records. As the level of cable penetration rises, submitted UCC, the public will have a greater demand for data such as that in the local inspection file, making retention of this requirement even more necessary now than previously.[14]

11. Commenters generally believed that local authorities should promulgate rules which address local information filing and recordkeeping needs.[15] Only one such authority, the New Jersey Office of Cable Television ("OCT"), filed comments in this proceeding. OCT is the local governmental agency responsible for cable television franchising and regulation within the State of New Jersey.[16] Its regulatory program imposes various filing and record-keeping requirements upon cable systems in order to provide for citizen participation in cable television operations and proposals.[17] With minor exceptions, OCT's recordkeeping requirements oblige New Jersey cable systems to disclose the same information presently required by Section 76.305. OCT has indicated that if Section 76.305 is deleted, it will mandate that New Jersey cable systems include in their public inspection files any information formerly required by the Commission which has not yet been required by the State of New Jersey.[18]

12. All commenters who discussed the advisability of retaining Section 76.306 supported the Commission's proposal to delete this rule. They agreed with the Commission's position, as stated in the *Notice,* that because cable systems no longer pay an FCC fee based on the number of subscribers,[19] retention of the rule requiring the maintenance of subscribers records is unjustifiable.[20]

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[14] UCC, alleging examples of non-compliance or of incomplete compliance by cable systems with the requirements of Section 76.305, asserted that there is a need for increased enforcement of this rule to assure that the public has access to the requisite information.

[15] Commenters also argued that it was more useful to maintain a central public inspection file at the office of the local authority than in the business office of the system itself.

[16] *N.J.S.A.* 48:5A-1 *et seq.*

[17] *N.J.A.C.* 14:17-1 *et seq.*, and 14:18-1 *et seq.*

[18] Finally, OCT suggested that the Commission clearly state in its rule making that changes in federal rules do not excuse cable systems from compliance in full with state and local public information file regulations.

[19] *See* n.32 *infra.*

[20] Only one commenter, Buckeye Cablevision, expressed concern that in the absence of Sections 76.305 and 76.306, as well as other cable regulations, local regulation would become more extensive and burdensome than Commission regulation had been.

Discussion

13. After carefully reviewing the record in this proceeding, we are persuaded that most of the public file requirements of Section 76.305, as well as the recordkeeping obligations of Section 76.306, are unwarranted. To a large extent, the information in the public inspection file either has no utility due to a number of deregulatory actions already taken by the Commission, or is not being utilized by the public to a sufficient degree to warrant retention.

Provisions No Longer Necessary Due To The Deregulation of Cable Television.

14. Section 76.305(a)(1) of the Commission's Rules requires maintenance in a system's public inspection file of the system's franchise application and all related exhibits, amendments and other documents. However, we have eliminated the mandatory aspect of the Commission's franchise standards.[21] For that reason, we no longer require that cable operators file copies of their franchises or other appropriate authorizations from state or local authorities with the Commission.[22] Similarly, the retention of franchise material should not be the subject of a Commission requirement. In short, the public no longer participates, at the Commission level, in matters affecting the franchising process. Nor did the Cable Act assign to the Commission any responsibility to regulate or otherwise supervise the franchise procedure either initially or at renewal.[23] Consequently, Section 76.305(a)(1) does not serve any federal purpose sought to be achieved either by the Commission or the Congress. Therefore, we are eliminating it.

15. Section 76.305(a)(2) requires that a system maintain its Certificate of Compliance application, all exhibits, documents and correspondence with the FCC relating to such application, and any notifications to add television signals filed pursuant to former Section 76.11(a), in its public file. The Commission, however, no longer maintains a Certificate of Compliance process.[24] Moreover, in 1978, Section 76.11(a) was deleted and its substantive provisions were incorporated in a new Section 76.12.[25]

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[21] Although the Commission had retained a franchise fee limitation, Section 622 of the Cable Act now governs the matter.

[22] *Report and Order* in Docket No. 21002, n.6. *Supra.*

[23] Indeed, as we noted earlier, the Cable Act comports completely with the Commission's reliance on local authorities in franchise matters and other local incidents of cable service. *See* para. 6, *Supra.*

[24] *See* n.7 *Supra.*

[25] *See* n.7 *Supra.* Recordkeeping requirements for signal carriage notifications (registration statements) that were now to be filed pursuant to the new Section 76.12 were specified in a new Section 76.305(a)(9) adopted at the same time as Section 76.12. The reference to former Section 76.11(a), however, was never deleted from Section

Consequently, Section 76.305(a)(2) serves no purpose as the documents required for filing are no longer in existence, and we are therefore eliminating it.

16. One of the provisions of Section 76.305(a)(7) directs cable systems to keep in their public file the information concerning subscription cablecasting required to be kept by Section 76.225(a). However, the Commission's subscription cablecasting rules were invalidated by the Court of Appeals in 1977,[26] and Section 76.225 was subsequently deleted by Commission action.[27] Thus, the information provided by these records is of no current utility.[28]

17. Section 76.305(a)(9) requires that each cable system keep registration statements filed pursuant to Section 76.12 in its public inspection file. These statements, containing such information as the system operator's name, address, community served and system signal carriage data, were filed on two distinct occasions: (1) whenever a system commenced operation, and (2) whenever the system added a broadcast television station to its signal carriage complement. The obligation to file a registration statement for signal carriage changes, however, was recently eliminated,[29] both because the Commission no longer restricts cable systems' importation of distant television signals,[30] and because signal carriage data are otherwise available through the cable system annual report (FCC Form 325). Since future signal carriage registration statements will not be filed and the information in past statements is already, or soon will be, reflected in systems' annual filings, no purpose is served by a recordkeeping requirement concerning such registration statements. The relevant portion of Section 76.305(a)(9) will, therefore, be eliminated.[31]

18. The *Notice* also proposed deletion of Section 76.306, although it is not one of the public inspection file requirements. This regulation requires cable television operators to retain records of subscribers served and to make them available to the Commission upon request. This provision was adopted in order to assure that information would be available to assist

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76.305(a)(2). The signal carriage notification aspects of Section 76.12 and Section 76.305(a)(9) are discussed at paragraph 17, below.

[26] *See Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977).

[27] *Order*, 67 F.C.C. 2d 252 (1978).

[28] The provision of Section 76.305(a)(7) concerning network program nonduplication agreements is addressed in paras. 19-21 *infra.*

[29] *Order* in MM Docket No. 83-1292, 49 Fed. Reg. 27152 (July 2, 1984).

[30] *See* n.10 *Supra.*

[31] Registration statements are still required to be filed by a system upon first providing service to subscribers. As to the need to retain Section 76.305(a)(9) to ensure the availability of these statements, see paras. 19-21, *infra.*

the Commission in verifying that the annual fees owed by cable television systems to the Commission were properly calculated. These fees had been calculated on a per subscriber basis. Since such fees are no longer collected,[32] retention of this recordkeeping requirement serves no purpose. Therefore, it will be eliminated.

Other Provisions of Section 76.305.

19. The remaining provisions of Section 76.305 raised for consideration by the *Notice* are not related to or dependent on substantive rule sections that have been eliminated by prior Commission action.[33] We are nonetheless persuaded that these provisions should also be deleted. Our conclusion in this regard is prompted by the strong and essentially uncontroverted evidence in this proceeding that the costs of maintaining these records are substantial, yet the public benefit, measured by actual use, has been quite small.

20. As to the costs of maintaining the records required by the above provisions of Section 76.305, commenters have asserted that the financial burden is high. The costs entail money expended for such items as gathering and compiling the data, photostating and mailing it to affiliated systems, and providing office space for retention. We have no reason to

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[32] The Commission suspended collection of annual fees in all services effective January 1, 1977. *Order*, 41 Fed. Reg. 56646 (December 29, 1976). This action was a direct result of the U.S. Supreme Court's decision in *National Cable Television Association, Inc. v. United States*, 415 U.S. 316 (1974), which held that the Commission's rationale for setting the annual CATV fee was not adequately clear. The Court remanded the matter to the Commission for further proceedings. A related series of decisions handed down by the Court of Appeals for the District of Columbia Circuit in 1976 invalidated the Commission's grounds for establishing a fee schedule. For a summary of these cases, *See Notice of Inquiry* in Docket No. 78-316 (Fee Refunds and Future FCC Fees), 69 F.C.C. 2d 741 (1978). *See also Second Notice of Inquiry* in that proceeding, 44 Fed. Reg. 48287 (August 10, 1979). These *Notices* commenced a proceeding to determine appropriate fee refund and future fee schedules, but no subsequent action on this matter has been taken by the Commission.

[33] The specific paragraphs of Section 76.305 at issue are:

(a)(3)	Petitions and requests filed by the system with the Commission.
(a)(4)	FCC Forms 325.
(a)(6)	Applications for transfer of control of CARS stations.
(a)(8)	Orders, decisions and rulings by the Commission concerning the system.

Also considered here are that part of paragraph (a)(7) concerning network program nonduplication agreements and paragraph (a)(9) insofar as it requires retention of registration statements filed by cable systems upon commencing operation. The provision of Section 76.305(a)(7) requiring that cable systems keep in their public file information concerning subscription cablecasting was discussed in para. 16 *Supra*. Section 76.305(a)(9) as it pertains to signal carriage registration statements was discussed in para. 17 *Supra*.

question this assertion, and it appears reasonable. Moreover, every indication has been given that the public does not avail itself of the information thus provided. Not only are these records rarely put to any practical use, they are rarely even inspected. Further, the costs of maintaining them are likely to be eventually passed on to subscribers and they thus impose an unwarranted burden on the public as well as cable operators.[34]

21. Moreover, much of the information which, by our action here, will no longer be placed in the public file, will continue to be accessible in the Commission's records.[35] Thus, the data will be available, but the cost to the cable operator and subscriber of such availability will be greatly reduced. Further, the most significant information in the public inspection file relates to matters primarily of local regulatory concern. Such information either already is locally available, or easily can be made available for public use by local authorities, and nothing herein or in the Cable Act precludes such local rules where they are deemed necessary to meet local requirements.[36]

22. Our decision in this matter is also in keeping with a clear congressional mandate in the area of federal recordkeeping. Recent Congressional legislation unequivocally requires us to closely scrutinize rules that impose costly recordkeeping requirements and, where the public interest benefits of such rules are not commensurate with their costs, to eliminate them.[37]

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[34] *See Report and Order*, 48 Fed. Reg. 39222 (August 30, 1983), in which the Commission eliminated the Cable Television Annual Financial Report. In that decision, we noted that the costs incurred by collecting the financial data were too extensive in relation to the negligible benefits conferred. We also found that the public would not be benefitted since operators' costs of compliance would be passed on to subscribers.

[35] The information required to be placed in the cable operator's local file by Section 76.305(a)(3), (4), (6) and (8) is also filed with the Commission and is accessible to the public under Sections 0.451 through 0.461 of the Commission's Rules. Members of the public may obtain documents by mail directly from the International Transcription Service ("ITS"), 4006 University Drive, Fairfax, Virginia 22030. Pursuant to a contract negotiated between ITS and the Commission, ITS is authorized to duplicate and sell to the public all documents maintained by the Commission and available for inspection under the Freedom of Information Act (5 U.S.C. §552) and the Rules and Regulations of the Federal Communications Commission.

[36] In the *Notice*, the Commission sought comment on whether a cable operator should be required to provide the franchising authority with a copy of any filing or communication to or from the Commission. All parties addressing this suggestion opposed it unequivocally. Since we agree with their argument that such a rule would constitute an inappropriate intrusion into the domain of an independent authority which is best able to make a determination of its own regulatory needs, we are rejecting this alternative.

[37] *See* Regulatory Flexibility Act, 5 U.S.C. §601 *et seq.* (Supp. 1984), and Federal Paperwork Reduction Act, 44 U.S.C. §3501 *et seq.* (Supp. 1984).

Conclusion

23. In sum, we believe that deleting the subject provisions of Sections 76.305 and 76.306 of the Commission's Rules is fully warranted. Given our broad deregulation of cable television, the minimal level of utilization of the subject files by the public, and the substantial costs associated with their maintenance, we can no longer justify the industry-wide imposition of these recordkeeping requirements. This action is fully consistent with the provisions of the recently enacted Cable Communications Policy Act of 1984.

24. Pursuant to the requirements of Section 604 of the Regulatory Flexibility Act, 5 U.S.C. §604 *et seq.*, a Final Regulatory Flexibility Analysis has been prepared and is set forth in the attached Appendix A.

25. Authority for the action taken herein is contained in Sections 4(i) and (j) and 303(r) of the Communications Act of 1934, as amended.

26. Accordingly, IT IS ORDERED, That the Commission's Rules ARE AMENDED, effective March 18, 1985, as described above and set forth in the attached Appendix B.[38]

27. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL CAUSE this *Report and Order* to be printed in the FCC Reports.

28. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

29. For further information concerning this proceeding, contact Belford V. Lawson, Mass Media Bureau, Washington, D.C. 20554, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

*Appendix C-may be seen in FCC's Dockets Branch, 1919 M Street, N.W., Washington, D.C.

Appendix A

Regulatory Flexibility Analysis

I. *Need for and Purpose of Rule*

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[38] It appears that the reference in Section 76.305(a)(7) to Section 76.205(c) as the rule provision requiring retention of records relating to origination cablecasts by candidates for public office contains an inadvertent error. Section 76.205(c) formerly referred to such records but was redesignated as Section 76.205(d) in the *Report and Order* in BC Docket No. 78-103, 68 FCC 2d 1049 (1978). Section 76.305(a)(7), however, was never amended to reflect this redesignation. Accordingly, in amending Section 76.305 pursuant to our decision herein, we are also amending that provision to incorporate the correct reference to Section 76.205(d) of the Rules.

1. The Commission has concluded that most of the cable television public inspection file requirements are unnecessary either because of the deregulation of cable television or because they are otherwise unwarranted.

2. The Commission also concluded that cable subscriber records no longer need to be retained. Since the Commission no longer charges cable systems a fee based on the number of subscribers, this information is unnecessary.

II. *Summary of Issues Raised by Public Comment in Response to the Initial Regulatory Flexibility Analysis, Commission Assessment, and Changes Made as a Result.*

A. *Issues Raised*

3. Except for one commenter, all the parties supported eliminating the relevant regulations. Data and other evidence submitted by these commenters indicated the high cost of compliance with the public inspection file requirements, as well as the negligible use of the files by the public. Commenters also argued that the deregulation of cable television eliminated the need for the imposition at the federal level of many of these requirements.

4. Only one commenter, the United Church of Christ, objected to the deletions, arguing that state/local authorities were disinterested in requiring maintenance of public inspection files, lacked capacity to regulate comprehensively and reasonably in this area, and lacked the means to enforce such filing requirements effectively. A comment by the New Jersey Office of Cable Television disputes this view.

B. *Assessment*

5. The Commission concludes that the arguments favoring deletion of the pertinent rules have merit. Given the general deregulation by the Commission of cable television, no current or anticipated federal regulatory goals exist to which the use of many of the records in the manner originally intended might contribute. Also, the general level of utilization of the files by the public appears to be at best minimal, thus not counterbalancing the high costs of maintaining those records. The deletion is consistent with the provisions of the Cable Communications Policy Act of 1984.

C. *Changes Made as a Result of Such Comments*

6. Responding to the comments, we have eliminated the pertinent requirements.

III. *Significant Alternatives Considered and Rejected*

7. The *Notice* sought comment on whether cable systems should be required to send to their state or local franchising authority copies of all correspondence between the systems and the Commission. We rejected this alternative as impinging on the jurisdiction of state/local authorities. These governmental bodies are best able to make a determination of their own regulatory needs.

Appendix B

1. 47 CFR 76.305 is amended by removing paragraphs (a)(1), (2), (3), (4), (5), (6), (8) and (9); and by redesignating paragraph (a)(7) as paragraph (a) and revising it (paragraph (a)) and paragraph (c) to read as follows:

§76.305 Records to be maintained locally by cable system operators for public inspection.

(a) Records to be maintained. The operator of every cable television system having 1000 or more subscribers shall maintain for public inspection a file containing a copy of all records which are required to be kept by Section 76.205(d) (origination cablecasts by candidates for public office); Section 76.221(f) (sponsorship identification); and Section 76.311(j) (equal employment opportunities).

* * * * *

(c) The records specified in paragraph (a) of this section shall be retained for the periods specified in §§76.205(d), 76.221(f) and 76.311(j).

* * * * *

2. 47 CFR 76.306 is removed in its entirety.

Distress Sale
Minority Ownership of B/C Facilities
Ownership Minority
Station, Sale of
Transfer of Control

Commission extended one year holding period to licenses obtained under Minority Ownership Policy, but refused to extend it to incumbent licensees who succeed in obtaining renewal in a comparative hearing. In addition, Commission adopted general exception to holding period for any applicant desiring to sell to a minority-owned or controlled entity in furtherance of Minority Ownership Policy. —*Amendment of Section 73.3597*
BC Docket No. 81-897

FCC 84-528

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Section 73.3597 of the Commission's Rules (Applications for Voluntary Assignments or Transfer of Control)	BC Docket No. 81-897

MEMORANDUM OPINION AND ORDER

Adopted: November 8, 1984; Released: February 11, 1985

BY THE COMMISSION: COMMISSIONER PATRICK DISSENTING AND ISSUING A STATEMENT IN WHICH COMMISSIONER DAWSON JOINS.

I. Background

1. The Commission has before it a petition for reconsideration of our *Report and Order* in this proceeding,[1] filed on behalf of the Citizens Communications Center, Chinese for Affirmative Action, Citizens Committee on the Media, the National Association for Better Broadcasting, and the National Citizens Committee for Broadcasting (hereinafter collectively referred to as "Citizens"). The National Association of

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[1] FCC 82-519, 47 Fed. Reg. 55924 (December 14, 1982), 52 RR 2d 1081 (1982).

Broadcasters ("NAB") filed an opposition to this petition, and Citizens has responded to these comments.

2. In the *Report and Order*, the Commission deleted Section 73.3597 (a) through (d) of the Commission's Rules. These rules required that an application for assignment or transfer of a broadcast license be designated for hearing if the current licensee had held the station for less than three years unless specified extenuating circumstances were present or a waiver was granted. The Commission concluded that in the present competitive marketplace environment the public interest could best be served through elimination of the three year rule and its underlying "trafficking" policy. However, to assure that the Commission's licensing process was not undermined and service to the public delayed, the Commission adopted a one year holding period, after commencement of operation, where the licensee obtained the permit as a result of a grant through the comparative hearing process.

II. Citizens' Petition

3. Citizens argues that the *Report and Order* failed to respond to the intent of Congress with respect to holding requirements, as expressed in the Conference Report to the 1982 amendment of Section 309(i) of the Communications Act ("Conference Report").[2] According to Citizens, Congress therein demonstrated an unambigious view that the public interest requires retention of the three year rule or "similar protections" for licenses awarded by lottery. Citizens asserts that the Commission acknowledged this Congressional mandate in the *Notice of Proposed Rule Making* in the lottery proceeding,[3] but ignored it in the instant proceeding. In addition, Citizens reargues that the courts and the Commission have long recognized the close relationship between the goal of the trafficking rules and the Commission's public interest obligations under Section 310(d) of the Act. According to Citizens, the *Report and Order* simply rejected this contention without any rationale. Therefore, Citizens requests that the Commission reexamine its conclusions in the *Report and Order*.

4. Alternatively, Citizens contends that the rationale utilized by the Commission for the establishment of a one year holding period for licensees who obtained their licenses through the comparative process requires that the one year holding period also be applied to licenses received under the Minority Ownership Policy[4] and to an incumbent

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[2] H.R. Rep. No. 765, 97th Cong., 2d Sess. 9, 45 (1982).

[3] *Second Notice of Proposed Rule Making* in Gen. Docket No. 81-768, FCC 82-420, 47 Fed. Reg. 45046 (October 13, 1982).

[4] *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979 (1978). *See also Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 48 Fed. Reg. 5943 (February 9, 1983).

licensee who prevails in a comparative proceeding. Under the Minority Ownership Policy, a transferee can obtain a broadcast station at a reduced price by virtue of a "distress sale" or through the seller's receipt of a tax certificate. Citizens argues that such financial incentives can create a potential for abuse of the Commission's policy through the rapid resale of the station to a non-minority. This would thwart the Commission's purposes in adopting the Minority Ownership Policy. However, Citizens argues that the process could be protected by imposition of a one year holding period.

5. Citizens also argues that the Commission has an interest in ensuring that its comparative renewal processes are not undermined through an immediate sale of the station by a successful incumbent. Citizens suggests that the imposition of a one year holding period would ensure that the incumbent minimally fulfills the expectations upon which the Commission based its renewal grant.[5] Thus, Citizens asserts that the incumbent who has been benefited from the Commission's processes should fulfill its obligation to provide "best practicable service" for a minimum of one year.

III. Discussion and Conclusions

6. After careful consideration, we conclude that Citizens' request for retention of the three year rule must be denied. However, we have determined that a modified one year holding period should be extended in certain situations, as discussed below.

7. In the *Report and Order*, we made a determination that the public interest would be best served through elimination of the three year rule and its underlying trafficking policy. In making this determination, we examined the entire record, including the Conference Report. We determined that Congress therein had expressed its concern that the Commission's lottery preference scheme not be undermined through rapid resale, but it did not mandate that the Commission retain the three year rule or the trafficking policy. Thus, in the lottery proceeding, the Commission "devise[d] similar protections (to the trafficking rules) to help ensure that the very purposes sought to be achieved by the preference scheme be fulfilled,"[6] but did not impose a three year restraint on resale. For similar reasons, a three year holding period is not required here. Citizens' next argument concerning the nexus between Section 310(d) of the Act and the trafficking rules is simply a restatement of an argument that was fully

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[5] *See Cowles Broadcasting, Inc.*, 86 FCC 2d 993, 1012 (1981), *aff'd sub nom. Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503, 506-08 (D.C. Cir. 1982).

[6] Conference Report, *Supra* n.2. *See also Report and Order* in Gen. Docket No. 81-768, 93 FCC 2d 952, 972 (1983).

considered by the Commission before adoption of the *Report and Order*. Therefore, reconsideration on this grounds will be denied.

8. We are convinced, however, that the existing one year holding period should be extended to licenses obtained through the Minority Ownership Policy. The *Report and Order* adopted a one year holding period for licensees who received their initial grant through the comparative process so that the permittee who benefited from the Commission's processes would at least minimally fulfill the expectations upon which grant had been made and not delay the introduction of services to the community. Similarly, the Commission seeks to foster and facilitate minority ownership of broadcast stations by providing broadcast licensees with an incentive to transfer to minority-owned or controlled entities. Specifically, the Commission provides for the use of a tax certificate which enables the seller of a broadcast station to defer the tax on the gain realized upon a sale. In addition, the distress sale policy allows licensees that have been designated for revocation hearing or whose renewal applications have been designated for hearing on basic qualification issues to sell their stations to a minority-owned or controlled entity, at a price "substantially" below its fair market value.[7] As Citizens points out, the rapid resale of such a station to a non-minority at a profit would subvert our goal of increasing minority ownership of broadcast stations. Moreover, a one year holding period would be consistent with our action in the lottery proceeding and in the *Report and Order* in this proceeding. We conclude that transferees who obtain a station under the Minority Ownership Policy should be subject to the one year holding period in order to protect the integrity of the Policy.

9. We recognize, however, that strict application of the holding period could work against our policy objective of increasing minority participation in broadcasting by precluding certain sales of broadcast facilities to qualifying minority entities. To avoid this unintended result and further encourage minority broadcasting, we will no longer apply the one year holding period to any applicant whose proposed transaction involves an assignment or transfer to a minority-owned or controlled entity in furtherance of our Minority Ownership Policy. Of course, transferees obtaining a license by this exception would themselves be subject to the holding requirement for purposes of any subsequent transfer, unless such subsequent transfer were also exempt.

10. Finally, we are not persuaded that the one year holding requirement should be extended, as Citizens requests, to incumbent licensees

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[7] Ordinarily, a licensee whose license has been designated for hearing would be prohibited from selling, assigning or otherwise disposing of its interest until the issues have been resolved in the licensee's favor. *Bartell Broadcasting of Florida*, 45 RR 2d 1329, 1331 (1979).

whose licenses are renewed as a result of comparative proceedings. Unlike an applicant receiving its initial license, a renewal applicant generally presents a record of past broadcast performance which has been documented and which is typically the primary basis upon which renewal is granted. Such performance reflects a level of stability and commitment to providing broadcast service which significantly attenuates our concern with rapid license reassignment by renewal applicants. We note that, for similar reasons, even the broader and more restrictive three year trafficking rule was never applied to successful renewal applicants.[8] Moreover, there is nothing in the present record to suggest that successful renewal applicants have precipitously sold broadcast stations. We conclude, therefore, that insufficient justifications exists for the Commission to impose a one year holding period upon incumbent licensees who succeed in the comparative renewal process.

11. Accordingly, IT IS ORDERED That, the Petition for Reconsideration filed on behalf of Citizens Communications Center, Chinese for Affirmative Action, Citizens Committee on the Media, the National Association for Better Broadcasting and the National Citizens Committee for Broadcasting, IS GRANTED to the extent described herein and in all other respects IS DENIED.

12. IT IS FURTHER ORDERED That, Section 73.3597 of the Commission's Rules IS AMENDED, effective March 20, 1985, as described above and set forth in the attached "Appendix A."

13. IT IS FURTHER ORDERED That, FCC Form 314 and 315 will be amended by separate Commission action, in accordance with the provisions of this *Memorandum Opinion and Order*.

14. IT IS FURTHER ORDERED That, the Secretary SHALL CAUSE a copy of this *Memorandum Opinion and Order* to be published in the FCC Reports.

15. Authority for this action is contained in Sections 4(i) and (j), 303 and 405 of the Communications Act of 1934, as amended, and Section 1.429 of the Commission's Rules.

16. For further information concerning this proceeding, contact Robert E. Branson, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX "A"

Rule Changes

47 C.F.R. Section 73.3597 is amended by revising paragraphs (a) and (a)(1) and by adding paragraph (a)(5) to read as follows:

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[8] *See Report and Order* in Docket No. 13864, 32 FCC 689, 692 (1962).

Section 73.3597 Procedures on transfer and assignment applications.

(a) If, upon the examination of an application for FCC consent to an assignment of a broadcast construction permit or license or for a transfer of control of a corporate permittee or licensee, it appears that the station involved has been operated on-air by the current licensee or permittee for less than one year, the application will be designated for hearing on appropriate issues unless the FCC is able to find that:

(1) the permit or license was not authorized either through the Minority Ownership Policy or after a comparative hearing or, in the case of low power TV and TV translator stations, the permit or license was not authorized after a lottery in which the permittee or licensee benefited from minority or diversity preferences:

(2) * * *

(3) * * *

(4) * * *

(5) the assignee or transferee has made an affirmative factual showing, supported by affidavits of a person or persons with personal knowledge thereof, which establishes that the proposed transaction would involve an assignment or transfer to a minority-owned or minority controlled entity in furtherance of our Minority Ownership Policy.

* * * * *

DISSENTING STATEMENT OF COMMISSIONER DENNIS R. PATRICK IN WHICH COMMISSIONER DAWSON JOINS

In Re: Reconsideration of Amendment of Section 73.3597 of the Commission's Rule (Anti-trafficking rule) (BC Docket 81-897)

I dissent to the Commission's reaffirmance of its 1982 decision to replace the three-year "anti-trafficking" rule with a one-year rule.[1] I find the reasons for elimination of the three-year rule compelling, but equally applicable to the one-year rule.

In 1962, the Commission adopted the three-year rule out of belief that a licensee needed three years to implement proposals in its application, gain an understanding of the needs and desires of the community being served, and adjust its programming to meet such needs and desires.[2] The Commission was concerned that disruption of ownership (*i.e.*, holding a license for less than three years) would frustrate these efforts, perhaps leading to a deterioration in programming and service to the public.[3] The Commission appropriately concluded in 1982 that continuation of the three-year anti-trafficking rule did not necessarily lead to deterioration of service to the public. Quite the contrary, it was concluded that the rule artificially restricted transfers which would likely promote the public interest. The Commission concluded that a willing buyer is more likely to provide service most desired by the community than an unwilling owner restricted from selling his station.[4]

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[1] The one-year rule at issue in this docket effectively prohibits a broadcast licensee from transferring or assigning its license for one year after operation commences (by designating the license for hearing), when the license was obtained after a comparative hearing. 47 C.F.R. § 73.3597(a). The Commission's rulemaking in this docket does *not* address or affect licenses obtained through a lottery.

[2] Applications for Voluntary Assignments or Transfer of Control, 32 F.C.C. 689 (1962).

[3] *Id.*

I wholeheartedly agree. But I also think that the same buyer is likely to provide service that is more in the public interest than the unwilling owner restricted from selling his station, again by Commission fiat, for one year.

The Commission's decision in 1982 to restrict its modified one-year rule to licenses acquired after a comparative hearing does not persuade me that the rule is justified. Nor does the Commission's explanation that a one-year rule is desirable in order to require licensees to meet "the expectations upon which the grant has been made . . . to prevent abuse of the Commission's licensing processes."[5] I find this reasoning faulty in several respects.

First, the disincentive of expending the time and money to go through the Commission's hearing process is probably the *best* assurance that an applicant in fact intends to operate the station. The likelihood that any comparative applicant intends to operate the station is strengthened by Commission rule 73.3597(c), which restricts payments upon transfer of a construction permit to out-of-pocket expenses. An applicant must not only go through the hearing process with no assurance of winning, he must also then construct the station and become operational before selling for a profit. A subsequent one-year holding period is not needed as additional disincentive.

Second, to the extent an applicant was not the real party in interest or misrepresented material facts, including its original intent to operate the station, its character would be called into question. Under Commission procedure, a licensee of unfit character may be prohibited from transferring its license. Because the Commission must approve every request for transfer or assignment, we will have the opportunity to thwart sham transactions if necessary.

Third, to the extent the Commission feels that a holding period is required to ensure that promises made in the comparative hearing are met (a reason hauntingly similar to the Commission's reason for adopting the three-year rule in 1962), the full license term would make as much, or more sense than one year. And no one (thankfully) is suggesting the former. The fact is that we use our comparative process to make the best determination we can of who will serve the public interest. After that, subject to our approval at the time of transfer and upon renewal, we allow the market to determine who will next hold the license. The licensing process is no more abused if the transfer occurs 364 days after a station's operation begins than 366 days after operation commences.

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[4] Applications for Voluntary Assignments or Transfer of Control, 52 RR 2d 1081 (1982).

[5] *Id.* at (1087).

Fourth, the historical record suggests that this Commission has liberally granted waivers of the waiting period restricting transfers. As such, elimination of the one-year rule would amount to little more than reversing the presumption so as to allow transfers, unless the record suggests that the transfer would *disserve* the public interest.

Last, and most fundamentally, absent evidence to the contrary (which could be reviewed in processing the application for transfer), we should assume that transfers serve the public interest. A willing seller has determined that the value of the station to it is less than the value of the station to a willing buyer. In a workably competitive marketplace, the value of that station is largely a function of how successful its owners are in programming to meet the needs, interests and desires of its broadcast community. Presumptively, therefore, transfers promote our public interest policy goals by ensuring that licenses will gravitate to operators most responsive to community demand. This Commission has found television and radio markets to be workably competitive in other dockets.[6] Inexplicably, a majority of the same Commission now find that transfers within these markets constitute "trafficking," *viz.*, a dangerous thing to be prohibited by regulatory intervention. Use of the perjorative term "trafficking" only masks the inconsistency. The transfer of a station, subject to review and prohibition in extraordinary circumstance, is an essential part of the competitive broadcast marketplace which this Commission has extolled in other contexts.

Accordingly, I dissent.

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[6] *See* In the Matter of the Revision of Programming and Commercialization Policies, Ascertainment Requirements and Program Log Requirements for Commercial Television Stations, 56 RR 2d 1005 (1984); In the Matter of Deregulation of Radio, 55 RR 2d 1401, *recon. denied*, 57 RR 2d 93 (1984).

Coverage, Issue
Misrepresentation, Character Qualification
Ownership and Management, Integration of
Power Equipment, Auxiliary

In hearing matter of five mutually exclusive applications for a new commercial television station in Hammond, Indiana, Review Board reversed ALJ's grant and awarded it to a competing applicant. Board diminished ALJ's winner's quantitative integration credit on ground it was nonmanagerial and enhanced comparative coverage preference given to eventual winner.
—*Apogee, Inc.*
BC Docket No. 82-195

FCC 84R-98

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Apogee, Inc. Hammond, Indiana	BC Docket No. 82-195 File No. BPCT-810814KE
Hammond Indiana T. V., Inc. Hammond, Indiana	BC Docket No. 82-196 File No. BPCT-811006KK
Jovan Minority Broadcasting Corporation Hammond, Indiana	BC Docket No. 82-197 File No. BPCT-811006KL
Pan American Broadcasting Company Hammond, Indiana	BC Docket No. 82-200 File No. BPCT-811007KG

Cross Country Network, Inc. Hammond, Indiana	BC Docket No. 82-202 File No. BPCT-811007KI
For Construction Permit	

Appearances

James E. Greeley on behalf of Apogee, Inc.; *John R. Feore, Jr.* on behalf of Hammond Indiana T.V., Inc.; *William S. Reyner, Jr.*, *Susan Wing*, and *Timothy J. Dowling* on behalf of Jovan Minority Broadcasting Corporation; *Harry C. Martin* on behalf of Pan American Broadcasting Company; and *Leo I. George* on behalf of Cross Country Network, Inc.

DECISION

Adopted: December 28, 1984; Released: January 8, 1985.

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL.

BOARD MEMBER JACOBS:

1. This proceeding involves the mutually exclusive applications of Apogee, Inc. (Apogee), Hammond Indiana T. V., Inc. (HITV), Jovan Minority Broadcasting Corporation (Jovan), Pan American Broadcasting Company (Pan American), and Cross Country Network, Inc. (Cross Country) for authority to construct a new commercial television broadcast station on Channel 62 at Hammond, Indiana. By Hearing Designation Order, 47 Fed. Reg. 16675, published April 19, 1982, these applications, along with three others that were eventually dismissed [1], were designated for consolidated hearing on an air hazard issue against Pan American; limited financial issues against Jovan, Pan American, and Cross Country; and the standard comparative issue.

2. Subsequently, presiding Administrative Law Judge (ALJ) Joseph P. Gonzalez enlarged the issues in this proceeding to include a Section 73.3518 issue (filing of inconsistent applications) against HITV, a misrepresentation issue against Pan American, and an additional limited financial issue against Jovan. *Memorandum Opinions and Orders*, FCC 82M-2794, released September 24, 1982; FCC 83M-584, released February 18, 1983; and FCC 83M-3448, released September 29, 1983. The ALJ also

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[1] The applications of Northwest Indiana Television, Inc.; Hammond Telecasters, Inc.; and Cafricam Television, Inc. were dismissed with prejudice by *Orders*, FCC 82M-3703, released November 22, 1982; FCC 82M-1920, released June 17, 1982; and FCC 84M-587, released February 2, 1984, respectively.

broadened the standard comparative issue to include consideration of the areas and populations to be served by each applicant. *Memorandum Opinion and Order*, FCC 82M-1919, released June 17, 1982. The misrepresentation issue regarding Pan American also involved Focus Television Company, A Joint Venture (Focus), an applicant in another ongoing proceeding (BC Docket Nos. 82-259 and 82-260, Kannapolis, North Carolina), where a similar issue had been added. The parties to both proceedings agreed that the Hammond proceeding should be the sole forum for resolving the common misrepresentation issue, and it was the subject of a Preliminary Initial Decision (P.I.D.) released February 13, 1984 (FCC 84D-8), in which Judge Gonzalez concluded that there was no basis for disqualifying or assessing comparative demerits against either Pan American or Focus. Additionally, summary decision was granted on the limited financial issues in favor of all applicants against whom the issues were directed. *Memorandum Opinions and Orders*, FCC 82M-2562, released August 23, 1982; FCC 82M-2867, released September 17, 1982; FCC 82M-3312, released October 25, 1982; and FCC 83M-4210, released November 15, 1983.

3. In an Initial Decision (I.D.) released June 11, 1984 (FCC 84D-41), the ALJ granted Pan American's application. He resolved the air hazard issue in Pan American's favor, concluded that the Section 73.3518 issue against HITV need not be resolved in light of HITV's inferior comparative ranking, awarded both Pan American and Jovan substantial diversification preferences over Apogee and HITV and a very slight preference over Cross Country, gave Pan American a moderate integration preference over Jovan, and found that Jovan was entitled to a slight coverage preference. In choosing between the two strongest applicants, the ALJ ruled that the integration preference awarded Pan American was sufficient to outweigh the preference given Jovan for its superior coverage and dictated the grant of Pan American's application.

4. This proceeding is now before the Review Board on exceptions filed by all of the applicants. Additionally, Focus, a party to the Kannapolis proceeding but not a party here, filed a motion for leave to file reply exceptions (together with its reply brief) and a motion to strike that portion of Jovan's exceptions which challenge the ALJ's P.I.D. concerning the misrepresentation issue against Pan American (and Focus). Pan American filed a similar motion to strike. The Board has reviewed the P.I.D. and I.D. in light of the exceptions and reply briefs, the oral argument held November 16, 1984, and our examination of the record. The ALJ's findings of fact and conclusions of law in the P.I.D. and I.D. are adopted except as modified herein, but we reverse certain of his conclusions under the standard comparative issue and ultimately conclude

that a grant of Jovan's application would best serve the public interest, convenience and necessity. We will first treat the exceptions to the P.I.D.

5. *Misrepresentation Issue.* In FCC 83M-584, *Supra*, the ALJ added an issue against Pan American to determine whether its 50% principal, Enrique Lopez, misrepresented his intentions to the Commission when he tendered a settlement agreement in another proceeding, and whether he intended to circumvent the then existing prohibition against receiving excessive reimbursement in connection with such a settlement. The issue concerned the circumstances surrounding a merger agreement submitted to the Commission in February 1980 by Focus and Latin American Communications, Inc. (LACI) (in which Lopez was a 25% shareholder), who were applicants for a new television broadcast station in Joliet, Illinois. Under the agreement, which was approved by the Commission on April 4, 1980, Lopez was to receive, *inter alia*, stock in the permittee, employment, a directorship, and access to program time for Spanish language programming. Instead, however, by their subsequent actions, Lopez (and LACI) severed their equity and other interests in the Joliet permittee in return for substantial financial compensation far exceeding their expenses incurred in pursuit of the television station. Commission policy at the time, reflecting the provisions of Section 311(c)(3) of the Communication Act, 47 U.S.C. §311(c)(3), limited reimbursement for withdrawal of competing applications to the aggregate amount determined by the Commission to have been legitimately and prudently expended in connection with the prosecution of the application. [2] Although the statutory restriction on reimbursement imposed by Section 311(c)(3) did not technically apply to merger agreements, Commission policy did require a close scrutiny of such agreements to determine whether they were *bona fide* mergers of competing interests or were devices to evade the limitations applicable to non-merger agreements. *See Venton Corp.*, 90 FCC 2d 307, 312, 51 RR 2d 1208, 1212 (1982).

6. In his P.I.D., the ALJ concluded that the evidence did not support a finding that the merger agreement was conceived to evade existing Commission restrictions against excessive reimbursement or that the persons involved intended anything other than a *bona fide* merger. P.I.D., para. 21. He found that the changes to the approved merger agreement were the result of circumstances unforeseen by the parties (see paras. 10-18 of the P.I.D. for a full history) that developed during the time the merger agreement was awaiting approval and were made in good faith to meet pressing business needs. *Id.*, para. 22. He opined that once the

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[2] On September 13, 1982, Section 311(c)(3) of the Act was amended to delete the reimbursement restrictions and by its *Order* released March 3, 1983, *Texas Television, Inc.*, FCC 83-95, the Commission followed suit. See *Order*, FCC 83-152, released April 14, 1983, for the actual rule change.

merger agreement was approved, any party could divest himself of his equity or other interests on terms acceptable to the parties and that in any event the value of the buy-out arrangement was not easily quantifiable because the interests given up by Lopez were in the nature of a continuing relationship. *Id.* The ALJ concluded that no basis had been shown for disqualifying or assessing a comparative demerit against either Pan American or Focus. *Id.*, para. 24.

7. Jovan's exceptions challenge the ALJ's findings favorable to Pan American on this issue. Pan American's and Focus' motions to strike this part of Jovan's exceptions argue that Jovan's objections are untimely under Section 1.276(a)(1) of the Commission's Rules, which requires that exceptions to an initial decision be filed within 30 days after its release, and that their consideration would be disruptive to the Kannapolis proceeding where no timely exceptions were filed on this issue. (The release date of the P.I.D. was February 13, 1984, and Jovan's exceptions were filed on July 11, 1984.) In the alternative, Focus has filed a reply brief which is opposed by Jovan. [3]

8. We will consider Jovan's misrepresentation exceptions. [4] Specifically, Jovan charges that the ALJ erred in framing the issue in terms of Lopez's intent. It argues that excessive reimbursement and profit are *per se* incriminating and that had the Commission been informed when it approved the agreement that the parties did not intend to effectuate any aspect of the merger, it would have been statutorily prohibited from approving any reimbursement above $5000, the amount alleged to have been spent by LACI, and far less than the amount actually received by LACI and Lopez. We find no merit in these exceptions. The ALJ's proper duty under this issue was to determine whether the agreement was a *bona fide* merger of competing interests or merely a device to evade the statutory proscription against excessive reimbursement. See paragraph 5, *Supra*. The issue, which focused on intent, was sufficiently broad to permit exploration of this question. Additionally, the issue specified against Focus in the Kannapolis proceeding, and tried here, to explore all

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[3] Focus' application for the Kannapolis facility was granted by the Review Board in a Decision, released August 30, 1984 (56 RR 2d 1335), and the proceeding is currently pending before the Commission on an application for review filed October 1, 1984.

[4] Contrary to the contentions made in the motions to strike, Jovan's exceptions to the P.I.D. were not due within thirty days of its release. Because the P.I.D. only resolved one of the issues in the Hammond and Kannapolis proceeding, it did not qualify as an initial decision under the definition prescribed in Section 1.267(b) of the Rules, 47 C.F.R. 1.267(b). Hence, we believe exceptions under this issue could be filed, as they were here, within thirty days of the release of the I.D. Nor has a sufficient showing been made that consideration of Jovan's exceptions would be potentially disruptive to the Kannapolis proceeding. Since Focus was a party to this issue in the consolidated hearing, and its pleading may be of assistance to our review, we will also consider Focus' reply brief and grant Focus party status for that limited purposes only. *See* Section 1.276(a) of the Rules, 47 C.F.R. 1.276(a).

of the facts and circumstances surrounding the Focus/LACI agreement, was amply broad to encompass all of the relevant information. Once the question of merger *bona fides* was answered in the affirmative, the inquiry was over and it mattered not that LACI or Lopez received more than their expenses incurred in prosecuting the application. *Venton Corp.*, *Supra*, 90 FCC 2d at 313, 51 RR 2d at 1212 (the Commission does not wish to restrict the "exercise of business judgments by applicants to a precise dollar figure represented by reimbursable expenses when the Act clearly does not impose such a restriction").

9. However, Jovan also questions the legitimacy of the merger agreement and actions taken by the parties during the pendency of the application. Here its doubts and unfavorable characterizations are seriously deficient procedurally because they fail in main part to contain specific references to record evidence on which they may be based, as required by Section 1.277(a) of the Rules, 47 CFR §1.277(a). Nor does Jovan's representation in note 27 of its brief that the facts underlying its arguments are documented in its Supplemental Findings comply with the requirements of Section 1.277(a). *See Filing Exceptions and Briefs Before Review Board*, 69 FCC 2d 1193, 44 RR 2d 960 (Rev. Bd. 1978). In any event, substantively, we believe that Jovan has not undermined the ALJ's analysis of the merger agreement since nowhere has it adduced any evidence of a conspiracy to evade the excessive reimbursement restriction nor has it challenged the business reasons advanced for abrogating the merger arrangement. Moreover, as noted in Pan American's reply brief, it was not LACI or Lopez, but Focus, which initially sought to undo the merger arrangement; and Lopez, who had a significant interest and role in the station's proposed Spanish language programming (in addition to his equity interests), can hardly be faulted for taking full advantage, in what was essentially a private business transaction, of the financial benefits resulting from his departure. *Cf. Mesabi Communications Systems, Inc.*, 57 FCC 2d 832, 835, 36 RR 2d 31, 35 (Rev. Bd. 1976). Jovan's contention that the merger arrangement was somehow a sham is conjectural and not sufficiently supported to overturn the P.I.D. We affirm the ALJ's findings and conclusions on this issue.[5]

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[5] Jovan, in note 5, also excepts to the summary decision resolving the financial issue in favor of Pan American, and the ALJ's failure to add a financial issue against the latter to determine whether its lender, Amvest Leasing, has the funds to lend to Pan American. Jovan asserts that the Board previously held that an applicant relying on Amvest must demonstrate that company's ability to fund an applicant, citing *Washington's Christian T.V. Outreach, Inc.*, 94 FCC 2d 1360 (Rev. Bd. 1983). Jovan overstates our holding. We simply upheld the ALJ's authority to require an applicant to establish his lender's (not a financial institution or equipment manufacturer) ability to provide a loan. 94 FCC 2d at 1363. We did not hold that in every instance such an inquiry was necessary. Jovan's exception is rejected.

10. *Comparative Issue: Background.* Although five applicants remain in this proceeding, only Jovan and Pan American possess any realistic possibility of prevailing under the standard comparative issue, for neither owns any other mass media interests and both were credited with 100% full-time quantitative ownership integration proposals by the ALJ. I.D., paras. 58, 65, 68-69. In contrast, Apogee, through its parent, has attributable ownership interests in four television facilities, in addition to one television construction permit, located in Indiana, Michigan, Nebraska, and Texas (see *Id.*, paras. 15-16); and HITV, via its 51% stockholder, is the majority shareholder in three television stations and one television construction permittee, situated in Indiana, Missouri, Georgia, and Louisiana. *Id.*, para. 20. Neither Apogee nor HITV proposes any ownership integration. *Id.*, paras. 17 and 22. Cross Country owns advertising and production companies, *id.*, para. 46, and although it proposes 100% part-time quantitative integration, its proposal was rejected by the ALJ on grounds that it was too vague and indefinite. *Id.*, para. 64. Both Jovan and Pan American were awarded substantial diversification preferences over Apogee and HITV and a very slight diversification preference over Cross Country. *Id.*, paras. 59-61. The latter thru applicants were not ranked in the ALJ's analysis of the integration criterion. *Id.*, paras. 62-71.

11. Apogee, HITV, and Cross Country do not seriously contest their inferior comparative status,[6] although Apogee and HITV question the magnitude of the diversification preferences given Jovan and Pan American, and Cross Country objects to its diversification demerit. Cross Country also claims 100% part-time quantitative integration credit. Finally, Apogee and HITV urge the Board to certify this proceeding to the Commission for disposition via lottery instead of adjudication because of the alleged closeness of the comparative qualifications of the two front-running applicants. We reject this game request on substantive grounds, because, while lotteries in legitimately tied broadcast cases have recently been authorized by the Commission, ***Random Selection Lotteries*** (Gen. Doc. No. 81-768), FCC 84-596, released December 4, 1984, paras. 16-18, in the instant case a clear choice can readily be made between Jovan and Pan American. Although we are inclined to agree with the exceptors that the magnitude of the diversification preferences awarded Jovan and Pan American over Apogee and HITV is overstated[7] and that the demerit

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[6] Consistent with their half-hearted exceptions, none of them (mercifully) appeared at the Board's oral argument.

[7] *See Phoenix Media Corp.*, 56 RR 2d 1241, 1245 (Rev. Bd. 1984) (applicant with no media awarded moderate preference over applicant with four in-state broadcast stations); *Angeles Broadcasting Network*, 56 RR 2d 149, 153 (Rev. Bd. 1984) (slight-to-moderate demerit for two broadcast interests in nearby states); and *Daytona Broadcasting Company, Inc.*, 55 RR 2d 1326, 1335 (Rev. Bd. 1984) (slight-to-moderate preference

suffered by Cross Country should be eliminated[8], we need not rule on these exceptions because even if they are correct, all three applicants would still rank comparatively far behind Jovan and Pan American.[9] We now turn to the exceptions to the comparative analysis as they relate to Jovan and Pan American.

12. *Integration.* Jovan is a corporation consisting of two stockholders, Joseph A. Stroud (99% owner) and his wife, Yvonne Marie Stroud (1%), both of whom propose to work full time at the station as General Manager and Station Manager, respectively. I.D., paras. 24, 26-27. The Strouds, who are Black and thus entitled to 100% minority enhancement credit, propose to move to Hammond. *Id.* Neither has any managerial broadcast experience. Apogee excepts to the ALJ's award to Jovan of 100% full-time quantitative integration credit, arguing that the Strouds have spent their entire lives in California, have business interests there, and are unlikely to go to Hammond, Indiana to work in a business in which neither has experience. The exception will be rejected since it is basically grounded on speculation and surmise and is unsupported by any record evidence that would tend to undermine the Strouds' commitments. Jovan will be accorded 100% full-time quantitative integration credit.[10]

13. Pan American is composed of three stockholders who propose to work at the station full time. Enrique Lopez, 50% shareholder, will serve as program director; Robert M. Ramirez, a 25% shareholder, plans to work

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where ownership interests were in two stations, one of which was in-state although 300 miles away).

[8] *See Focus Television Co., A Joint Venture, Supra,* 56 RR 2d 1375, 1340 n. 13 (production company not a media interest). Advertising and production companies may bear on the diversification criterion only if they undermine the objectives of Commission's diversification policy. *See Jerome Thomas Lamprecht,* FCC 84R-93, released December 17, 1984 (Rev. Bd.), para. 4; *Pittsfield Community TV Assn.,* 94 FCC 2d 1320, 56 RR 2d 134 (Rev. Bd. 1983); *Golden State Broadcasting Corp.,* 94 FCC 2d 212, 54 RR 2d 348 (Rev. Bd. 1983).

[9] Cross Country, the superior comparative applicant among the three, would still fall substantially behind Jovan and Pan American under the integration criterion even if credited with 100% part-time integration because such integration credit is accorded far less weight than full-time integration. *E.g., Daytona Broadcasting Company, Inc., Supra,* 55 RR 2d 1326, 1332-1333; *High Sierra Broadcasting, Inc.,* 96 FCC 2d 423, 55 RR 2d 627 (Rev. Bd. 1983), *rev. denied,* 56 RR 2d 1394 (Comm'n 1984). Furthermore, in light of HITV's distant comparative finish, we need not reach the exception to the ALJ's refusal to resolve the Section 73.3518 issue against it.

[10] Pan American notes in its exceptions that Mrs. Stroud was proposed in Jovan's original application as station manager but that the reference was deleted in an amendment filed on the cut-off date. Pan American suggests therefore that it was error to accept her commitment made at hearing. The exception is without merit. *See WHW Enterprises, Inc.,* 89 FCC 2d 799, 817, 51 RR 2d 409, 421 (Rev. Bd. 1982) (application does not call for entire integration proposal, and decisional authorities begin with application as of amendment cut-off date when checking for variances with later undertakings).

as the station's general manager; and Elvia Isabel Ramirez, a 25% shareholder, will be the office manager. *Id.*, paras. 30, 32, 36, 38. All are Mexican-Americans. Lopez, who lives in the station's proposed service area, has been involved in broadcasting since 1950. *Id.*, para. 39. Mr. and Mrs. Ramirez, who are husband and wife, propose to move to Hammond if their application is granted. *Id.*, paras. 35, 37. Mr. Ramirez has broadcast experience dating from 1973. *Id.*, para. 33. The ALJ credited Pan American with 100% full-time quantitative integration. Jovan contends that this was error, arguing initially that Mrs. Ramirez does not occupy a policy-making, managerial position. We agree with Jovan and will not accord Pan American integration credit for Mrs. Ramirez's role at the station.

14. The starting point of our analysis is the general proposition that without management and policy functions an applicant's principals do not merit ownership integration credit. *See New Continental Broadcasting Co.*, 88 FCC 2d 830, 839, 50 RR 2d 1117, 1125 (Rev. Bd. 1981)). Thus, we have previously held that clerical and ministerial tasks generally associated with the role of office manager are non-managerial and will not be credited.[11] *See Ottumwa Broadcasting Co.*, 92 FCC 2d 1011, 1016, 52 RR 2d 1447, 1451 (Rev. Bd. 1982); *Vacationland Broadcasting Company, Inc.*, 55 RR 2d 1299, 1305 (Rev. Bd. 1984); *See also Bradley, Hand, and Triplett*, 89 FCC 2d 657, 661, 51 RR 2d 383, 386 (Rev. Bd. 1982) (bookkeeping and interviewing held non-managerial). Here, the record reveals that Mrs. Ramirez will be the office manager responsible for ensuring that daily commercial transactions go smoothly. Pan American Exh. 3, p. 3. She will sell, log, and schedule commercials as well as interview people applying for positions at the station. Tr. 266-268. She testified that she would have some input on hirings, promotions, and firings but that the actual decisions in these matters would be in the hands of department heads or the general manager. Tr. 269-270. With the possible exception of this last function, Mrs. Ramirez's job appears to be more akin to typical broadcast employee-type activities than to the management and policy roles that the Commission's *Policy Statement, Supra* note 11, 1 FCC 2d at 395, 5 RR 2d at 1909, emphasizes. Because Pan American has failed to establish that Mrs. Ramirez's role would sufficiently involve policy making and station management functions, no integration credit is warranted. *See Vacationland Broadcasting Company, Inc., Supra.*

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[11] The ALJ relied on *Alexander S. Klein, Jr.*, 86 FCC 2d 423, 49 RR 2d 606 (1981), for crediting Mrs. Ramirez's integration proposal, but in *Klein*, the questioned role was that of business manager, a position specifically recognized by the Commission as warranting integration credit. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395, 5 RR 2d 1901, 1910 (1965).

15. Jovan also challenges the 50% integration proposal of Enrique Lopez on the ground that he has frequently abandoned broadcast enterprises in which he had an equity interest. Jovan cites five alleged instances dating from 1978 to the present. It is well established that integration credit may be diminished or even eliminated on the basis of an owner's past proclivity to withdraw from broadcast enterprises or his failure to honor fully integration commitments previously made. *See Seven Locks Broadcasting Co.*, 37 FCC 82, 86 (1964); *Washington's Christian TV Outreach, Inc., Supra*, at 1366-1367. Here, except for allegations relating to Lopez's withdrawal from the Joliet, Illinois proceeding, see paras. 5-9, *Supra*, the record evidence is too sparse to make a reasoned analysis with respect to most of the alleged incidents. We are concerned, however, about Lopez's undertaking in a Lakeland, Florida television application filed in May 1980 to work full time as Director of Programming.[12] That proposal would appear on its face to conflict with his proposed role at the Joliet, Illinois station, since the problems necessitating his withdrawal from the latter entity did not arise until either May or June 1980. *See* P.I.D., paras. 10-13. Although the timing of the Lakeland presentation also raises a *prima facie* question as to the efficacy of his full-time commitment here, we need not remand the case to explore this matter further because Pan American cannot in any event prevail under the comparative issue in light of our refusal to award credit for Mrs. Ramirez's integration proposal, see paras. 13-14, *Supra*, and our treatment of Jovan's proposal under the coverage criterion, see paras. 16-17, 19, *infra*. Although both front-runners are qualitatively well enhanced, in view of the clear quantitative difference between them (100% vs. 75%), the enhancements are not decisionally significant, and Jovan is entitled to a slight integration preference over Pan American. *See Bradley, Hand, and Triplett, Supra*, 89 FCC 2d at 663-664, 51 RR 2d at 388.

16. *Comparative Coverage*. The I.D. reflects that Jovan's proposed station would serve 3.5 million more people and nearly twice the area, compared with Pan American's coverage proposal (7,469,776 vs. 3,794,019 population and 5,378 vs. 2,680 sq. miles). *See* I.D., para. 55. Additionally, Jovan would provide service to 26,712 persons now underserved (receiving fewer than five services), including 6,522 in a 165 square mile area who would receive their first television service and 14,517 in a 309 square mile area who would receive their second. *Id.*, para. 54. In contrast, Pan

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[12] Lopez was President, director, and 50% owner of Plaza Broadcasting, Inc., which filed an application for a new commercial television station at Lakeland Florida on May 21, 1980 (File No. BPCT-800521KE). On July 28, 1982, this application was amended to delete Lopez as Director of Programming and convert his role to parttime involvement in "station operation" of "less than 20 hours per week." Jovan Exh. 9, p. 7.

American would provide Grade B service to 4,477 underserved persons, including 379 in a 15 square mile area who would receive their first service and 243 in a 2.5 square mile area who would receive their second. *Id.*[13] The ALJ concluded that Jovan was entitled to a preference under this comparative criterion, albeit only a slight one because the underserved population was relatively small in comparison to the total number of persons proposed to be served. *Id.*, para. 72. Jovan challenges the size of its coverage preference, asserting that Commission precedent dictates that its overall and underserved population superiority warrants an overwhelming and decisive comparative preference. Pan American, on the other hand, supports the ALJ's award of a slight preference to Jovan, but it and HITV contend that the ALJ erred in not reopening the record to reflect the recent grant of a television construction permit for a station at Pontiac, Illinois, which they assert would eliminate all but 976 persons who would receive a first television service from Jovan.

17. We agree with the ALJ that the Pontiac permit should not be considered at this late date. *Daytona Broadcasting Co., Supra,* is controlling on this point. There, the Board considered the question whether new grants occurring subsequent to the close of the hearing record should be weighed under the comparative coverage issue. After carefully addressing competing arguments regarding the importance of achieving administrative finality as opposed to recognizing changed circumstances, the Board held that it would consider only those changes which occurred up to the date of the official close of the evidentiary record. 55 RR 2d at 1339. Here, because grant of the Pontiac, Illinois construction permit occurred on April 27, 1984, more than nine months after the record was officially closed (July 15, 1983), it came too late to alter the data in the decision-making process.[14] Thus, Jovan is indeed entitled to a substantial preference for its coverage superiority. Jovan has a large advantage in its overall coverage which, standing alone, would entitle it to a slight preference even if the area were already well served. *See Christian Broadcasting of the Midlands, Inc.*, 57 RR 2d 87, 91-92 (Rev. Bd. 1984), and cases cited therein. However, the subject area is *not* well served. Jovan will provide third and fourth services to a greater number of persons than its competitors, *See Radio Jonesboro, Inc.*, 55 RR 2d 991 (Rev. Bd. 1984) (slight preference for providing third and fourth

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[13] We are omitting from this analysis the other three applicants because only Cross Country proposes to serve any significant underserved population (6,288 persons, including first service to 1556 and second service to 557), and it remains behind Jovan on every coverage factor. *See* I.D., paras. 54-55.

[14] In any event, at oral argument Pan American conceded the accuracy of Jovan's contention, Reply Br. at 14, that, even if the Pontiac grant is taken into account, Jovan will still provide first *and second* services to a total of 14,569 more persons than Pan American. Tr. 1399.

services to approximately 4000 persons), and, most important, Jovan will bring a first television service to 6000 persons and a second service to 14,000 persons more than Pan American. The largest preferences are traditionally awarded for provision of first and second services. *See FBC, Inc.*, 95 FCC 2d 256, 55 RR 2d 1344 (Rev. Bd. 1983) (substantial coverage preference to applicant providing a first and second service to 2,309 and 355 persons, respectively, and third and fourth services to 14,000). *See also Ram Enterprises*, 57 FCC 2d 844, 35 RR 2d 1507 (Rev. Bd. 1976) (decisive preference to applicant proposing first and second primary services). Furthermore, in *Christian Broadcasting of the Midlands, Inc.*, *Supra*, we awarded a moderate-to-substantial preference to an applicant proposing first and second services to 180 and 3,774 persons, respectively, and third, fourth, and fifth services to sizeable numbers. The only reason the applicant in *Christian* did not receive a substantial preference was because the first-service population was substantially smaller than that in *FBC, Inc.*, *Supra*, and *Ram Enterprises*, *Supra*. Here, the population numbers are comparable to the latter cases and support the award of a substantial preference. And the fact that the aggregate number of persons who will receive their first to fourth services is relatively small in comparison to the total number being served, as noted by the ALJ, is not relevant in view of the significant number of persons in underserved areas who will actually benefit from Jovan's proposal.

18. *Auxiliary Power*. Both Jovan and HITV urge that the ALJ erred in failing to award them a preference for proposing auxiliary power. We will grant these exceptions and award both applicants a minor auxiliary power preference based on our recent application of the Commission's *Addendum to Policy Statement on Comparative Broadcast Hearings*, 2 FCC 2d 667, 6 RR 2d 861 (1966), to television cases. *See San Joaquin Television Improvement Corp.*, 96 FCC 2d 594, 604, 54 RR 2d 1206, 1214 (Rev. Bd. 1983).

19. *Final Comparative Evaluation*. All exceptions having decisional significance have been considered by the Board. Jovan and Pan American are equal on diversification, and Jovan has been awarded a substantial coverage preference and slight integration and auxiliary power preferences over Pan American. Pan American in turn is superior to the three other applicants on the integration criterion. Thus, Jovan is plainly the comparative winner. Moreover, even if the Board had not diminished Pan American's integration credit by disregarding Mrs. Ramirez's proposed participation, and found its qualitative attributes superior, which at most would have entitled Pan American to a slight integration preference over Jovan, *See Christian Broadcasting of the Midlands, Inc.*, *Supra*, Jovan still would have prevailed comparatively on the strength of its outstanding coverage superiority. *Id.* We find that a grant of Jovan's application

would best serve the public interest, convenience, and necessity.[15]

20. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend, filed July 23, 1984, by Apogee, Inc. and September 6, 1984, by Hammond Indiana T.V., Inc. ARE GRANTED, and the amendments ARE ACCEPTED; that the motions to strike filed July 18 and 19, 1984, by Pan American Broadcasting Company and Focus Television Company, a Joint Venture, respectively, ARE DENIED; that the motion for leave to file reply exceptions, filed August 17, 1984, by Focus Television Company, A Joint Venture IS GRANTED; and that the contingent petition to enlarge issues, filed November 28, 1984, by Jovan Minority Broadcasting Corporation IS DISMISSED; and

21. IT IS FURTHER ORDERED, That the application of Jovan Minority Broadcasting Corporation (File No. BPCT-811006KL) for a construction permit for a new television station at Hammond, Indiana IS GRANTED; and the applications of Apogee, Inc. (File No. BPCT-810814KE); Hammond Indiana T.V., Inc. (File No. BPCT-811006KK); Pan American Broadcasting Company (File No. BPCT-811007KG) and Cross Country Network, Inc. (File No. BPCT-811007KI) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS, *Member, Review Board*

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[15] In light of our disposition, we need not reach Jovan's November 28, 1984 contingent petition to enlarge issues against Pan American.

FCC 84D-8

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of

Apogee, Inc. Hammond, Indiana	BC Docket No. 82-195 File No. BPCT-810814KE
Hammond Indiana T.V., Inc. Hammond, Indiana	BC Docket No. 82-196 File No. BPCT-811006KK
Jovon Minority Broadcasting Corporation Hammond, Indiana	BC Docket No. 82-197 File No. BPCT-811006KL
Pan American Broadcasting Company Hammond, Indiana	BC Docket No. 82-200 File No. BPCT-811007KG
Cross Country Network, Inc. Hammond, Indiana	BC Docket No. 82-202 File No. BPCT-811007KI

For Construction Permit

Appearances

John R. Feore, Jr. on behalf of Hammond Indiana T.V., Inc.; *Susan Wing* and *William S. Reyner, Jr.* on behalf of Jovon Minority Broadcasting Corporation; *Harry C. Martin* and *Matthew H. McCormick* on behalf of Pan American Broadcasting Company; *Tom Hendrickson* on behalf of Cafricam Television, Inc.; *Thomas J. McCabe* on behalf of Cross Country Network, Inc.; *Benito Gaguine* and *Heidi P. Sanchez* on behalf of Focus Television Co., A Joint Venture; *Lee J. Peltzman* on behalf of Community Action Communications, Inc.; *Jeffrey W. Malickson* on behalf of Bahakel

Communications, Ltd.; and *Joseph Belisle* on behalf of Chief, Mass Media Bureau, Federal Communications Commission.

PRELIMINARY INITIAL DECISION
OF
ADMINISTRATIVE LAW JUDGE JOSEPH P. GONZALEZ

Issued: February 8, 1984; Released: February 13, 1984

Preliminary Statement

1. In response to a petition to enlarge issues filed by Jovon Minority Broadcasting Corporation (Jovon) on December 15, 1982, the undersigned, by Memorandum Opinion and Order released February 18, 1983 (FCC 83M-584) enlarged the issues designated against Pan American Broadcasting Company (Pan American) in BC Docket Nos. 82-195 through 82-202 (Hammond, Indiana), to include the following:

> To determine whether Enrique Lopez, Pan American's 50 percent owner, misrepresented to the Commission his intentions when he, along with other persons, tendered a settlement agreement to the Commission for approval in the proceeding for a television station on Channel 66, Joliet, Illinois; and whether Mr. Lopez' intention at the time was to circumvent the then existing restrictions against excessive reimbursement and profit-taking from the sale of stock in a permittee, and the effect of these determinations on Pan American's basic and comparative qualifications.

2. Community Action Communications, Inc. (CAC), an applicant in BC Docket Nos. 82-259 through 82-260 (Kannapolis, North Carolina), filed a similar petition with Judge Thomas B. Fitzpatrick on January 4, 1983. Judge Fitzpatrick by Memorandum Opinion and Order released March 7, 1983 (FCC 83M-767) added the following issues to the Kannapolis proceeding:

> To determine all of the facts and circumstances surrounding the execution of the various settlement agreements between Focus Broadcasting Co. and Latin American Communications, Inc. relative to Channel 66, Joliet, Illinois and whether the principals of Focus of Kannapolis, Inc. were lacking in candor or misrepresented to the Commission their intentions in tendering the "Joint Request for Approval of Agreement" on February 1, 1980 and the January 25, 1980 Agreement; and,
>
> To determine whether the principals of Focus of Kannapolis, Inc. intended at the time to circumvent the then existing restrictions against excessive reimbursement in connection with the dismissal of the application of Latin American Communications, Inc. and the effect [of] these determinations on the basic and/or comparative qualifications of Focus Television Co., A Joint Venture, to be a licensee.

Judge Fitzpatrick placed both the burden of proceeding and the burden of proof on Focus Television Co., A Joint Venture (Focus). He also observed that because of the similarity of the issues which had been designated in the two proceedings the issues should be tried in one forum, and Judge Fitzpatrick agreed to be bound by the findings and conclusions of the undersigned if the parties so stipulated. By letter dated March 17, 1983, the parties to the Kannapolis proceeding advised Judge Fitzpatrick that the parties had conferred among themselves and agreed that the Hammond proceeding should be the sole forum for resolving the designated issues and that the Kannapolis parties would be bound by the findings and conclusions reached by the Presiding Judge in the Hammond proceeding.

3. At a prehearing conference in the Hammond proceeding held on March 8, 1983, the undersigned placed the burden of going forward on the issues on Jovon and the burden of proof on Pan American. By Order released April 11, 1983 (FCC 83M-1172), the undersigned placed the burden of proceeding on the issues designated by Judge Fitzpatrick on CAC, while Focus retained the burden of proof

4. A hearing on these issues was conducted from June 23 to June 24, 1983 and on July 14, 1983. The record with respect to the above referenced issues was closed on July 14, 1983. By Order released July 18, 1983 (FCC 83M-2334), the undersigned ordered that separate findings and conclusions of law be submitted on these issues. Proposed findings of fact and conclusions of law were filed by Focus, CAC, WCCB-TV, Inc. (WCCB-TV)[1] Jovon, Apogee, Inc. (Apogee), and Hammond Indiana T.V., Inc. (HITV). Replies were received from Focus, CAC, Pan American and Jovon.

Findings of Fact

5. On September 7, 1978, Latin American Communications, Inc. (LACI) filed an application for authority to construct a new television station on Channel 60 in West Chicago, Illinois. The application was subsequently amended on January 30, 1979 to specify a station location in Joliet, Illinois and operation on Channel 66 (Tr. 1215-1216). Principals in this application included Mr. Enrique Lopez, Mr. Jaime Santillana and Mr. Michael Benages (Tr. 1296). Mr. Lopez was a 25 percent stockholder of LACI and an officer and director of LACI, and is a 50 percent stockholder in Pan American (Jovon Exh. 11, Agreement, p. 1). Mr. Benages, a lawyer, served as legal advisor to the LACI principals and was in charge of negotiating for the LACI principals in their dealings with Focus (Tr. 1267, 1304). Focus filed its application for authority to construct a new television station on Channel 66 in Joliet, Illinois on January 30, 1979. Focus indicated in its application its intention to broadcast subscription television programming (STV). Several other entities also applied for Channel 66 in Joliet (Pan American Exh. 12).

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[1] On June 30, 1983, WCCB-TV, Inc. notified the Commission that it had acquired by *pro forma* assignment of license, the license of Station WCCB-TV and that it would replace Bahakel Communications, Ltd., as a party in the Kannapolis proceeding. WCCB-TV, Inc. is a wholly owned subsidiary of Bahakel Communications, Ltd.

6. During the Summer of 1979, Focus and LACI participated in settlement negotiations (Tr. 889), which led to the signing on September 2, 1979 of a merger agreement between LACI and Focus (Jovon Exh. 11, p. 4). The merger agreement signed on September 2, 1979 (Tr. 1194) was amended in respects unrelated to any events under consideration here and was re-executed on January 25, 1980. The January 25, 1980 agreement was submitted to the Federal Communications Commission (FCC) on February 1, 1980 (Tr. 1166). The merger agreement provided, in pertinent part, for the following:

1. The issuance of 10 percent of the Focus stock to Messrs. Lopez and Santillana;
2. The employment by Focus of Lopez and Santillana as co-anchor of local news and as a producer of local Spanish programming, respectively;
3. A consulting agreement with a third LACI shareholder Michael Benages for a five-year term at $15,000 per year for five years;
4. The purchase by Focus of seven hours a week of Spanish language programming from LACI and/or Lopez and Santillana, paying them 25 percent of the gross revenues generated by the programs. Messrs. Santillana and Lopez would also receive their regular commission on all advertising sold by them on the programs; and
5. Mr. Lopez would be elected a director of Focus.

(Jovon Exh. 11, Agreement, pp. 2-4.)

7. Focus amended its application on March 28, 1980 to indicate, among other things, that Lopez and Santillana were new subscribers to the company and that Lopez would serve as a director upon approval of the merger (Jovon Exh. 15). The Commission approved the merger on April 4, 1980 (Tr. 826).

8. In the agreement, Mr. Lopez represented that he understood and had evaluated the risks of the venture, and that he was acquiring the share for investment purposes and not for resale (Jovon Exh. 11, Agreement, pp. 6-7). In the joint request for approval of agreement, the parties (Focus and LACI) represented to the Commission that the agreement was a merger of their interests, and that it served the public interest because it provided "substantial minority participation" in the station (Jovon Exh. 11, Joint Request, p. 4).

9. The Commission granted the joint request on April 4, 1980, concluding that the agreement anticipated a *bona fide* merger (Focus Exh. 1, pp. 24-25). During the Spring and Summer of 1980, Focus entered into settlement agreements with the other three applicants whereby all agreed to dismiss their applications with prejudice. The Focus/LACI merged applicant remained the sole surviving qualified applicant, and it was granted the Joliet construction permit (Tr. 825). The grant became final on August 21, 1980.

10. At the time Focus began negotiating for the dismissal of its competing applications, the STV programming and financing for its proposed station was dependent on its STV franchise agreement with Wometco Home Theatre of Illinois, Inc. (Wometco). Murchison, one of the original applicants for the Joliet station, agreed to assume, in the settlement agreement reached with Focus/LACI, the obligations of Wometco to supply STV programming as well as guarantee any loans made to Focus, thereby replacing Wometco as Focus' financial backer. Murchison, however, had an arrangement with another entity, Golden West Broadcasters (Golden West), under which Golden West would actually be the entity responsible for satisfying Murchison's obligation to Focus (Focus Exh. 1, p. 5). It was at a May 14, 1980 meeting, attended by Ruhe, that Ruhe first learned that Golden West was to be the entity responsible for supplying Focus' STV programming and for guaranteeing the loans to Focus required to construct and operate the station.

11. Golden West, some time in June 1980 (Tr. 922), informed Focus that one of the requirements necessary before Golden West would satisfy its obligations was a pledge by Focus of 100 percent of its stock (Tr. 895). Ruhe testified that he was informed by Golden West that the stock pledge would have to be made at the point of financing and that the stock pledge requirement came as a shock to him (Tr. 895). According to Ruhe, the requirement of Golden West for a 100 percent stock pledge was not contained in any document (Tr. 907).

12. Ruhe informed Benages of the stock pledge requirement (Tr. 934) and Benages subsequently advised Ruhe that Lopez and Santillana were unwilling to pledge their stock (Tr. 1074). Lopez and Santillana refused to pledge their stock because they viewed it as a form of security or a type of insurance that they would be able to broadcast Spanish language programming on the station (Tr. 937), and because they believed that the pledge would adversely impact on their influence at the station (Tr. 1076-1079); and that they would lose everything they had if the stock was pledged (Tr. 1268). Their reaction to the request for the stock pledge, according to Benages, stemmed in part from their experiences at a radio station in Chicago where Lopez and Santillana lost their rights to program time (Pan American Exh. 12, p. 4).

13. When Ruhe learned that Lopez and Santillana would not pledge their stock, he suggested that Focus purchase the stock (Tr. 935). According to his testimony, Ruhe had other reasons for wanting to purchase Lopez' and Santillana's stock. Ruhe testified that he believed that Santillana had a tendency to become violent (Tr. 889), and generally felt that minority shareholders had the ability to cause problems (Tr. 892).

14. On August 29, 1980, an agreement was entered into between Focus and LACI which superseded the January 25, 1980 agreement (Tr. 359). The agreement provided for the following:

1. The repurchase by Focus of the Focus stock issued to the LACI principals, with Mr. Lopez receiving $350,000 for his shares of stock; the $350,000 was to be paid by means of a promissory note, the payee being Mr. Lopez, to be secured by a pledge of Focus stock;
2. $60,000 to Mr. Benages in exchange for the consulting agreement;
3. $80,000 to LACI for two years of programming service by Messrs. Lopez and Santillana;
4. The cost of applying for the Hammond station (no value given); and
5. An increase in the amount of programming to be purchased from LACI by Focus from seven hours to 14 hours per week.

(Jovon Exh. 8.)

15. By the Fall of 1980, Ruhe learned that Golden West no longer desired to provide Focus with STV programming in Joliet (Tr. 944-945; Focus Exh. 1, p. 7). As a result, Murchison reacquired the STV rights it had given to Golden West and gave them to another entity with whom Murchison formed a joint venture (Murchison joint venture) which assumed the financial obligations to Focus (Focus Exh. 1, p. 8). Shortly before the station was to go on the air in September 1981, Focus announced new financing from Amvest Leasing and Capital Corporation to replace the Murchison joint venture commitment (Focus Exh. 1, p. 9). The Murchison joint venture, however, was still to provide STV programming. To secure this new financing, Focus agreed to pledge all of its stock (Jovon Exh. 26, p. 3).

16. Sometime after August 1981 and before the Joliet station went on the air, a television station in Chicago announced that it was going to provide STV programming 24 hours a day. The Murchison joint venture immediately approached Focus and requested that it be sold more hours to broadcast STV programming. Ruhe and the Murchison joint venture believed that without these additional STV hours, the Focus station would not be financially viable (Focus Exh. 1, p. 11). Ruhe agreed to give the Murchison joint venture rights to all the time it wanted, which included the 3:00 to 5:00 p.m. time period allotted LACI (Focus Exh. 1, p. 10).

17. In August or September 1981, Douglas Ruhe called Benages and told him that Focus wanted to buy back LACI's 14 hours of program time, particularly the 3:00-5:00 p.m. daily time segment specified in the August 1980 agreement. Ruhe explained Focus' financial problems to Benages and informed him of Focus' opportunity to make a new and more profitable deal with its STV franchise if it could offer to lease LACI's 14 hours (Pan American Exh. 12, p. 6). After discussing the matter with Lopez and Santillana, Benages called Ruhe and agreed to a meeting in

Chicago (Pan American Exh. 12, p. 6). The meeting occurred in late October 1981. At this meeting in Chicago, Benages told Focus that LACI would give up its 14 hours of programming if Focus would pay one million dollars to the LACI principals (Pan American Exh. 12, p. 7) and pay off its debt obligations of $175,000 each to Santillana and Lopez in cash. It was agreed between Santillana, Lopez and Benages that all considerations, including these cash payments, would be split evenly. Focus agreed to these terms, and the agreement, executed on November 6, 1981, provided as follows:

1. That Focus would pay LACI $350,000;
2. The stock pledge and notes held by LACI principals were cancelled;
3. Focus agreed to pay Lopez, Santillana and Benages each $306,666.66 over a six year period; and
4. Focus agreed to pay LACI principals 50 percent of the revenues from the sale of the time segment between 7:00 a.m. and 9:00 a.m. Sunday (for a certain period of time).

(Pan American Exh. 12, Attachment C.)

18. At no time after the signing of the merger agreement did Lopez or Santillana sit down and talk to Focus about an employment agreement (Tr. 1245-1246). Although Lopez and Santillana engaged in activities designed to obtain programming for the Joliet station (Tr. 1249-1251; 1059-1061), the parties to the merger agreement described the activities as primarily for the benefit of Lopez and Santillana and not Focus (Tr. 863-865, 1251). Lopez was not elected a director of the merged entity as provided for in the merger agreement, and he testified that he had no desire to be a director (Tr. 1246-1247) and was never asked to be a director (Tr. 1232). In addition, the Focus stock was not actually issued to Lopez and Santillana until August 1980, and Lopez and Santillana did not care whether the stock was issued (Tr. 1228-1229). According to Benages, it was felt among the LACI principals that there was no need to elect Lopez to the Board of Directors until the station was on the air.

Conclusions of Law

19. The Presiding Judge considers the above, detailed recitation of the events which occurred after April 4, 1980, the date the merger agreement was approved by the Commission, to be essential for the proper resolution of the issues at hand. Subsequent events, although they occurred after the submission and approval of the merger agreement, can be some indication of the true intent of the parties at the time they submitted the merger agreement for approval by the Commission.

20. In this instance, the subsequent modifications to the merger agreement which occurred fairly soon after the approval of the agreement by the Commission, raised questions as to the *bona fides* of the parties'

representation to the Commission at the time that they sought approval of the merger agreement that they contemplated a true merger. As a result, at the request of Jovon and CAC, an inquiry was ordered and conducted under the issues set forth above, with the burden on Focus and Pan American to establish plausible explanations for the subsequent amendments to the merger agreement.

21. After carefully considering all the evidence developed pursuant to this inquiry, the Presiding Judge finds that Focus and Pan American have come forward with plausible explanations for the series of amendments to the initial merger agreement; and that the evidence of record does not support a finding that the actions taken by the parties subsequent to the approval of the merger agreement by the Commission were designed to accomplish a plan, conceived either prior to or during the pendency of the merger agreement before the Commission, to evade then existing Commission procedures and/or restrictions; or that the parties to the merger agreement at any time prior to the approval of the agreement, intended anything other than a *bona fide* merger.

22. The evidence of record summarized above demonstrates that the changes to the approved merger agreement were due to circumstances unforeseen by the parties during the time the merger agreement was awaiting approval, and that the decisions taken to revise the merger agreement were made in good faith in an attempt to meet pressing business needs. In the absence of a showing of bad faith, the content of the various amendments becomes immaterial. The Joliet licensee was free to make whatever business decisions it considered to be in its best interests, and the LACI principals cannot be faulted for agreeing to revisions to the original merger agreement which appear to be highly favorable to them. Once the merger agreement was approved by the Commission, any party to the agreement was free to divest himself of his equity or any other interest he may have on any terms he may elect and the other party or parties are willing to meet. It is noted, in this regard, that although the buy-out arrangement appears at first glance to be very generous, the value of LACI's equity interest as well as that of the hours of programming given up by the LACI principals, is hard to quantify since both contemplate a continuing relationship. Accordingly, the total payment to the LACI principals may not be as generous as it may first appear.

23. In conclusion, the Presiding Judge notes that he does not consider it significant that the stock in the merged entity was not actually issued to Lopez and Santillana until the buy-back agreement was executed, or that Lopez was not elected a director as specified in the merger agreement. Benages, who served as legal advisor to both Lopez and Santillana, testified that the LACI principals did not feel that it was necessary to put

Lopez on the Board before the station actually went on the air. With respect to the issuance of stock to its LACI principals, Benages indicated that the LACI principals did not care whether or not the stock was actually issued, since they knew that they had it. Furthermore, the fact that neither Lopez nor Santillana performed any services for the merged entity is also of no significance, in view of the fact that their proposed duties related primarily to planning programming for the proposed station, and during the period of time in question the station was not on the air.

24. The testimonies of Messrs. Ruhe, Lopez and Benages, which the Presiding Judge found to be credible, and the other evidence of record, successfully rebut the adverse inferences initially drawn from the actions of the parties to the merger agreement which occasioned the designation of these issues. The contention of the parties to the agreement that they contemplated a true merger, during the time that their settlement agreement was pending before the Commission, stands unrefuted. The Presiding Judge concludes, therefore, that no basis has been shown for disqualifying Focus or Pan American or for assessing a comparative demerit of any degree against either Focus or Pan American. Accordingly, the issue designated against Pan American in the Memorandum Opinion and Order released February 18, 1983 (FCC 83M-584) is resolved in Pan American's favor, and the issue designated against Focus in the Memorandum Opinion and Order released on March 7, 1983 (FCC 83M-767) is resolved in Focus' favor.

25. IT IS ORDERED that a copy of this Preliminary Initial Decision WILL BE SENT to all parties in the Kannapolis, North Carolina proceeding (BC Docket Nos. 82-259 and 82-260).

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH P. GONZALEZ, *Administrative Law Judge*

Diversification of Control of Mass Media
Misrepresentation
Ownership and Management, Integration of
Remand

Review Board remanded proceeding on misrepresentation issues to explore genuineness and permanence of applicant's ownership integration proposal in light of charges that station will be syndicated out and/or professionally managed by others. Theatre and broadcast interests of applicants are cross-cancelling or warrant only a very slight preference, and assumption is rejected that husband and wife will jointly vote separate stock for majority integration control.
—*Cascade Video of Oregon, Ltd.*
BC Docket No. 82-254

FCC 84R-49

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of

Cascade Video of Oregon, Ltd. Portland, Oregon	BC Docket No. 82-254 File No. BPCT-811019KG
Portland Television Associates, Ltd. Portland, Oregon	BC Docket No. 82-256 File No. BPCT-811217KJ

For Construction Permit

MEMORANDUM OPINION AND ORDER

Adopted: June 28, 1984; Released: July 3, 1984.

BY THE REVIEW BOARD:

1. In an Initial Decision, FCC 83D-68, released December 20, 1983, presiding Administrative Law Judge Joseph P. Gonzalez (ALJ) resolved the above-captioned comparative broadcast proceeding in favor of Cascade Video of Oregon, Ltd. (Cascade). At issue is the authority to

construct and operate a new commercial television station on Channel 40 at Portland, Oregon, and the ALJ concluded that Cascade was the superior applicant under the criteria of the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 RR 2d 1901 (1965).

2. This matter is now before the Review Board on exceptions, briefs, and reply briefs filed by Portland Television Associates, Ltd. (PTA) and by Cascade, as well as Cascade's January 24, 1984 motion to reopen the record and enlarge the issues, its June 15, 1984 contingent motion to enlarge the issues, and responsive pleadings. Oral argument was held on April 6, 1984. We have reviewed the I.D. in light of these presentations and our own examination of the record and conclude that further hearing is required before we reach an ultimate decision in this case.

3. The genesis of our concern is Cascade's earliest motion to reopen the record and enlarge the issues, which was filed on November 10, 1983 (only six weeks before the I.D. was released), supplemented on December 2, 1983, and which spawned its January 24 and June 15, 1984 follow-up motions. There, Cascade alleged that newly discovered evidence derived from a separate comparative broadcast proceeding (Lawrence, Kansas — BC Docket Nos. 82-807, 808, 810) revealed that PTA never intended to fulfill its announced ownership integration proposal because of plans to syndicate out up to 49% of its ownership and to hire a firm to fully manage and operate the proposed station. Specifically Cascade asserted that one of PTA's three general partners, Forrest L. Preston, who owns a 25% equity interest in the partnership and is PTA's proposed station manager, is also a director and 8.82% stockholder of Media Central, Inc., a broadcast station management company, and a director and 25% stockholder of Consolidated Resources Corporation of America (CRCA), a financial and real estate investment firm that acquires investment properties and then offers them to investors. Cascade supplied voluminous exhibits to demonstrate that Media Central and CRCA are involved in an extensive plan to own and manage or syndicate out and manage a network of 12 or more UHF television stations throughout the United States.[1]

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[1] Media Central already has significant ownership interests and management agreements concerning UHF television permittees at Canton, Ohio, Honolulu, Hawaii, Kansas City, Missouri, Cape Girardeau, Missouri, and Huntsville, Alabama. I.D., para. 17; November 10, 1983 Motion at 15-16. It has also entered into management agreements (with no ownership) for UHF stations at Schenectady, New York, Appleton, Wisconsin, Columbus, Georgia, Knoxville, Tennessee, and Jackson, Mississippi. December 2, 1983 Supplement at 15. And David Vaughan, CRCA's President, recently testified before the Commission that ownership syndication has already been completed or is intended for the referenced Canton, Ohio, Columbus, Georgia, Cape Girardeau, Missouri, Knoxville, Tennessee, and Appleton, Wisconsin stations. November 10, 1983 Motion at 14-15. Finally, Preston is alleged to have ownership interests in pending UHF applications for Bellingham, Washington, Sacramento, California, and Caldwell, Idaho, as well as Portland, Oregon. November 10, 1983 Motion at n. 8.

4. In sum, Cascade contended that its evidence demonstrated a course of conduct that belied Preston's undertaking to serve as PTA's station manager "40 hours per week, on a daily basis, for an indefinite term" (PTA Exh. 4, at 1). Rather, it seemed more likely to Cascade that Preston and perhaps his partners would syndicate out their interests via CRCA and that PTA would enter into a full-service management agreement with Media Central.[2] Cascade urged that while a sale of Preston's interest would only diminish PTA's integration credit, a Media Central agreement would wipe out all integration credit because Media Central's pervasive management services would render superfluous the proposed managerial roles of all of PTA's integrated general partners. Hence, Cascade requested that the issues be enlarged to explore the *bona fides* and permanence of PTA's integration proposal, whether PTA misrepresented or lacked candor in setting forth its proposal, and whether PTA violated the application completeness requirment of Section 73.3514 of the Commission's Rules, 47 CFR 73.3514, by failing to disclose in answer to FCC Form 301, Section 2, Question 20 its plans to syndicate out its ownership or to have its station professionally managed.[3]

5. Not surprisingly, PTA opposed Cascade's motion as founded entirely upon speculation, conjecture, and surmise; however, it appended a sworn declaration by Preston, dated December 15, 1983, in which he denied that PTA is a "client" of Media Central or CRCA, denied that PTA has a syndication or station management arrangement with any company, and denied that any negotiations have taken place regarding such an arrangement. The ALJ denied Cascade's motion in the I.D. without reaching its merits, holding that even if the motion had merit and resulted in findings adverse to PTA it would not matter because he was proposing grant of Cascade's application. It is because our preliminary analysis indicates that (this matter aside) PTA's application may be comparatively superior to Cascade's that remand and further evidentiary exploration of

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[2] Cascade cited two recent cases in which construction permittees whose principals included Media Central stockholders entered into management agreements with Media Central despite their integration proposals — Columbus, Georgia and Jackson, Mississippi — and, apparently, the Columbus station is also slated to be syndicated out. November 10, 1983 Motion at n. 19; see note 1, *Supra*.

[3] Question 20 states: "The Commission is seeking . . . information as to contracts and arrangements now in existence as well as any arrangements or negotiations, written or oral, which relate to the present or future ownership, control or operation of the station." We omit discussion of a requested issue which attempts to fault Preston for not listing among his other broadcast "interests" stations in which Media Central has no ownership interest but does have a management contract. We do not believe that Form 301, Section 2, Question 17 was intended to reach that depth of inquiry. Similarly, we affirm the ALJ's refusal to consider those contracts as bearing on PTA's diversification of control credentials. *See Policy Statement, supra*, 1 FCC 2d at 394 n. 5, 5 RR 2d at 1908 n. 5; *New Continental Broadcasting Co.*, 55 RR 2d 413, 416-17 (Rev. Bd. 1983).

Cascade's allegations is necessary. See paragraphs 9-13, *infra*. We are gravely concerned about the import of Cascade's claims, as amplified in its January 24, 1984 additional motion and April 5, 1984 supplement, and believe that, taken together, these motions have established the requisite *prima facie* case for issue enlargement. *See Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090, 1097, 50 RR 2d 1251, 1257 (Rev. Bd. 1982), *rev. dismissed*, FCC 831-129, released November 9, 1983; *Washington's Christian Television Outreach, Inc.*, 94 FCC 2d 1360, 1367 (Rev. Bd. 1983) (case remanded on integration effectuation issue).

6. In reaching this conclusion, we take special note of the further allegations and supporting documentation contained in Cascade's January 24, 1984 motion to enlarge, again derived from the Lawrence, Kansas proceeding (see paragraph 3, *Supra*). For example, Exhibit C thereto indicates that Sterling Communications, Inc., which prepared PTA's Portland application, paid Media Central $5000 in connection therewith, and Exhibit N is a copy of a proposed civil complaint, prepared for former Media Central clients who were seeking a Louisville, Kentucky UHF television license, which alleges, *inter alia*, that Media Central and CRCA told the investors in that venture that they would not be required to operate the station notwithstanding that they were proposed to be integrated into the station's operations.[4] Cascade asserts that these exhibits (and others) establish that PTA is indeed a client of Media Central, despite Preston's previous denial, and that the integration proposals of Media Central clients cannot be trusted. As part of its February 17, 1984 opposition, PTA provides a further sworn statement by Preston, in which he denies knowledge of the aforementioned $5000 payment (and attempts to downplay its significance), again denies that any syndication or management agreement relating to Portland "has ever existed," and reaffirms his "firm intention" to move to Portland and serve as PTA's station manager. PTA's other general partners, Aubrey J. Burke and Carl W. Campbell, also supply sworn statements in which they reaffirm their integration commitments and aver that no syndication or management agreement "now exists or has ever existed." In another statement, Media Central's president, Morton J. Kent, avers that "There is not now and there never has been any agreement or understanding" between Media Central and PTA, and that Media Central does not enter into contracts, agreements, or understandings with FCC applicants prior to grant of a construction permit. Finally, CRCA President Vaughan (see note 1, *Supra*) states that CRCA "holds no agreement or understanding, nor does it presently intend to inter into" one for syndication of PTA, and asserts that the Louisville allegations are "absolutely false."

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[4] The Louisville application was returned to the applicant by the Commission as unacceptable for filing in March 1983 and was not resubmitted.

7. As with PTA's responses to Cascade's previous allegations, its latest denials do not persuade us that there is no material issue of fact here concerning the *bona fides* and permanence of PTA's integration proposal. Since all such proposals are prospective in nature, the fact that a syndication or management agreement or understanding may not *already* "exist" (a fact that is disputed by Cascade) is not fully responsive to Cascade's or our concerns, and, under the circumstances (see, for example, notes 1 and 2, *Supra*), we are struck by the absence from all of the statements proffered by PTA (except for Vaughan's) of any discussion or denial of *future* plans concerning Media Central or CRCA. This silence is especially troubling in light of the *Policy Statement*'s injunction that "it is important that integration proposals be adhered to on a permanent basis," 1 FCC 2d at 395 n.6, 5 RR 2d at 1909 n.6, and the fact that the relative permanence of integration proposals may be a matter of decisional significance in a comparative case. *See Cleveland Broadcasting, Inc.*, 7 FCC 2d 680, 699, 9 RR 2d 941, 964 (Rev. Bd. 1967). Further hearing is necessary to resolve these concerns.

8. We also note that similar issues involving Media Central and CRCA have now been designated for hearing or further inquiry not only in Lawrence, Kansas (Memorandum Opinion and Order, FCC 83M-3891, released October 28, 1983) but also in Bellingham, Washington (BC Docket Nos. 83-993, 994, Memorandum Opinion and Order, FCC 84M-1128, released March 6, 1984) and Caldwell, Idaho (BC Docket Nos. 82-746 and 747 and 83-1097, Memorandum Opinion and Order, FCC 84M-1191, released March 9, 1984). Indeed, the latter two proceedings also specifically involve Forrest Preston (see note 1, *Supra*).[5] While it may be possible for the various presiding ALJs and the parties to arrive at a *modus operandi* to permit the efficient and economical adduction of evidence on these issues, *See Focus Television Co., a Joint Venture*, FCC 84D-9 (Initial Decision released February 14, 1984), para. 6, we will not fashion such a procedure ourselves, nor will we decline to add the issues merely because they are in hearing elsewhere.

9. Significant exceptions have been raised by PTA concerning the ALJ's treatment of the applicants' diversification and integration proposals. We briefly treat them herein so that the ALJ may have the benefit of

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[5] The Caldwell case has been mooted by the dismissal of Preston's application as the result of a settlement agreement, Order, FCC 84M-2451, released May 29, 1984, and we reject Cascade's suggestion in its June 15, 1984 contingent motion to enlarge issues that the Caldwell issues should be specifically addressed and resolved in the instant proceeding. We are confident that all relevant matters will be adequately explored on remand, where the ALJ will be in the best position to rule on matters of germaneness and cumulativeness of evidence. We do not read *Allegan County Broadcasters, Inc.*, 83 FCC 2d 371, 48 RR 941 (1980), to require a different result and will therefore deny Cascade's contingent motion.

our views in preparing his Supplemental Initial Decision and to illustrate the importance of this remand to the ultimate comparative evaluation of Cascade's and PTA's applications.

10. In the I.D., para. 30, Cascade received a moderate diversification preference on the ground that PTA's attributable ownership interests in five broadcast stations through Forrest Preston's 8.82% ownership of Media Central (see paragraph 3 and note 1, *Supra*) were more significant than the fact that Mr. and Mrs. Thomas Moyer, who each own 25.5% of General American Theatres, Inc., which is the 100% owner of the sole general partner that operates the Cascade partnership, own a total of 74 movie theatres in the Portland area and the states of Washington, Nevada, California, and Idaho. PTA believes that the ALJ exaggerated the importance of Preston's broadcast interests by not applying the appropriate ownership diminishing multiplier (here 8.82%) and by not emphasizing that the nearest of the five stations is 1490 miles from Portland. Using the multiplier, PTA would have a 3.528% attributable interest in a Canton, Ohio station, 8.82% in a Honolulu, Hawaii station, 5.292% in stations in Kansas City and Cape Girardeau, Missouri, and 4.851% in a Huntsville, Alabama station. On the other hand, PTA argues that the ALJ understated the importance of the Moyers' theatre ownership, considering that they own some 12-14 theatres in the Portland area (the other 60 are out-of-state), and may "totally dominate" the movie industry there.

11. We agree with PTA that its attributable broadcast interests are almost *de minimis* when the multiplier and distance factors are *both* weighed (the ALJ did note the "considerable distance" of Media Central's stations in paragraph 30 of the I.D.). *See Greater Wichita Telecasting, Inc.*, 90 FCC 2d 1046, 1049-50, 51 RR 2d 1604, 1606-07 (Rev. Bd. 1982), *modified on new facts*, 55 RR 2d 926 (1984).[6] However, we do not agree that Cascade's attributable interests have been understated. First, we note our recent holding in *Peoples Broadcasting Corp.*, 52 RR 2d 1617, 1630 (Rev. Bd. 1983), *rev. denied*, FCC 83-594, released December 15, 1983, that movie theatre ownership is entitled to only negligible media interest credit in this day and age. There, we gave no diversification weight to ownership of eight theatres in the Indianapolis area; Cascade's attributable interest in 12-14 theatres here is not legally or factually distinguishable. Second, while PTA speculates that these Portland theatres may dominate the local theatre industry, it has not furnished any

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[6] In *Corporate Ownership Reporting and Disclosure by Broadcast Licensees*, Docket No. 20521, FCC 84-115, released April 30, 1984, the Commission raised the basic ownership benchmark for attribution under the multiple ownership rules to 5%, but there is no indication that this change is intended to apply to the diversification criterion in comparative broadcast proceedings.

evidentiary support for this economic diversity argument; hence, it must be rejected as mere surmise. *See Multiplex Communications, Inc.*, 95 FCC 2d 406, 408-09, 54 RR 2d 733, 734-35 (Rev. Bd. 1983); *Old Time Religion Hour, Inc.*, 54 RR 2d 989, 997 (Rev. Bd. 1983). On balance, if Cascade's and PTA's interests are not totally cross-cancelling, *Greater Wichita, supra*, at most Cascade is entitled to a very slight diversification preference over PTA.

12. Turning to the integration criterion, PTA was awarded only a slight ownership integration preference over Cascade in the I.D., at para. 37, essentially because the ALJ treated the Moyers' combined 51% voting interest in General American as tantamount to 100% control over Cascade's sole general partner. He then translated that control into 50% full-time (40 hours) quantitative integration credit for Mrs. Moyer and 50% substantial-time (30 hours) credit for Mr. Moyer for their proposed roles as Cascade's business manager and general manager, respectively, citing *Cleveland Television Corp.*, 91 FCC 2d 1129, 52 RR 2d 581 (Rev. Bd. 1982), *rev. denied*, FCC 83-235, released May 18, 1983, *aff'd sub nom. Cleveland Television Corp.* v. *FCC*, No. 83-1659 (D.C. Cir. April 20, 1984) (majority stockholder of parent company given full integration credit for voting shares of subsidiary), and *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 49 RR 2d 1589 (1981) (lack of integration by limited partners does not diminish integration credit). Using this approach, the ALJ held that PTA's 66⅔% full-time quantitative integration credit and 33⅓% part-time (20 hours) credit, as qualitatively enhanced, exceeded Cascade's 50% full-time credit and 50% substantial-time credit, as enhanced, no more than slightly. We agree with PTA that the ALJ erred in his reliance on the *Cleveland* case and should not have aggregated the Moyers' separate ownership interests in General American into 51% voting control. Had the ALJ's assumption of joint voting been supported by the record, *Cleveland* would be apposite; however, in the instant case the record contains testimony by Mrs. Moyer (Tr. 132) that she would be independent-minded in broadcast matters. This testimony prevents an inference of joint voting by husband and wife, and such voting may not be presumed. *Absolutely Great Radio, Inc.*, 55 RR 2d 15, 18-19 (1983). Therefore, Cascade deserves only 25.5% full-time integration credit and 25.5% substantial time-credit. When these revised credits are weighed against PTA's integration proposal, the balance tips even more strongly in PTA's favor and entitles PTA to a moderate integration preference over Cascade, instead of a slight preference. *E.g., Scott & Davis Enterprises, Inc., supra* (55% full-time integration proposal versus 30% full-time proposal yields moderate integration preference).

13. While diversification is normally the decisive preference in comparative evaluations, this is not always the case, and "a diversification

advantage may be outweighed by a more significant integration advantage." *Gilbert Broadcasting Corp.*, 91 FCC 2d 450, 470, 52 RR 2d 429, 444 (1982), *recon. denied*, FCC 83-30, released January 25, 1983. *Accord, Cleveland Television Corp., supra; Old Time Religion Hour, Inc., supra*. Because these precedents suggest that in the instant case it might well be appropriate for a moderate integration preference to prevail over a very slight (or, *a fortiori*, a non-existent) diversification preference, it is imperative that PTA's integration credentials be more closely scrutinized, in light of Cascade's serious charges, to determine whether PTA is indeed entitled to victory.

14. ACCORDINGLY, IT IS ORDERED, That the motions to reopen the record and enlarge issues, filed by Cascade Video of Oregon, Ltd. on November 10, 1983 and January 24, 1984 ARE GRANTED to the extent indicated above; and that the following issues ARE ADDED against Portland Television Associates, Ltd.:

> To determine whether Portland Television Associates, Ltd. has misrepresented facts and/or lacked candor regarding the genuineness and permanence of its integration proposal, and the effect thereof on its basic or comparative qualifications.
>
> To determine whether Portland Television Associates, Ltd. has misrepresented facts, lacked candor, or violated Section 73.3514 of the Commission's Rules in failing to disclose plans to syndicate out its ownership or to have its proposed station professionally managed, and the effect thereof on its basic or comparative qualifications.

15. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence on the above issues SHALL BE on Cascade Video of Oregon, Ltd.; that the burden of proof SHALL BE on Portland Television Associates, Ltd.; and that this proceeding IS REMANDED to the presiding Administrative Law Judge for the adduction of evidence on the above issues and for the preparation of a Supplemental Initial Decision.

16. IT IS FURTHER ORDERED, That the motions for leave to amend filed by Portland Television Associates, Ltd. on February 28, April 12, and May 11, 1984 ARE GRANTED, and the amendments ARE ACCEPTED.

17. IT IS FURTHER ORDERED, That Cascade Video of Oregon, Ltd.'s request for official notice filed April 11, 1984 IS GRANTED, and that its contingent motion to enlarge the issues filed June 15, 1984 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS, *Member, Review Board*

FCC 83D-68

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Cascade Video of Oregon, Ltd. Portland, Oregon	BC Docket No. 82-254 File No. BPCT-811019KG
Portland Television Associates, Ltd. Portland, Oregon	BC Docket No. 82-256 File No. BPCT-811217KJ
For Construction Permit	

Appearances

William H. Crispin, William E. Canard and *Diane Greenlee* on behalf of Cascade Video of Oregon, Ltd.; *Peter A. Casciato* on behalf of TS-3 Communications, Inc.; *Robert S. Stone* on behalf of Portland Television Associates, Ltd.; *Martin E. Firestone* and *S. Ford Rowan* on behalf of Vinco Communications, Inc.; *Lawrence N. Cohn* on behalf of Allied Broadcasting Corp., and *Joseph Belisle* on behalf of Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
JOSEPH P. GONZALEZ

Issued: December 12, 1983; Released: December 20, 1983

Preliminary Statement

1. This proceeding involves the mutually exclusive permit applications of Cascade Video of Oregon, Ltd. (Cascade) and Portland Television Associates, Ltd. (PTA) for a new commercial television station to operate on Channel 40 in Portland, Oregon.[1]

2. By Hearing Designation Order released on May 12, 1982 (Mimeo No. BC 3948) and published in the *Federal Register* on May 24, 1982 (47

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[1] The applications of Vinco Communications, Inc., Allied Broadcasting Corp. and TS-3 Communications, Inc. were dismissed with prejudice by Orders released on January 10, 1983 (FCC 83M-100), February 7, 1983 (FCC 83M-456) and July 25, 1983 (FCC 83M-2460), respectively.

Fed. Reg. 22405), the Commission, by the Chief, Broadcast Bureau, acting pursuant to delegated authority, designated these applications for hearing in a consolidated proceeding on the following issues:[2]

1. To determine with respect to each of the applicants, whether there is reasonable assurance that its specified transmitter site will be available.
2. To determine, with respect to Portland Television Associates, Ltd., whether there is a reasonable possibility that the tower height and location proposed would constitute a hazard to air navigation.
3. To determine which proposal would, on a comparative basis, best serve the public interest.
4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

3. By Memorandum Opinion and Order released August 2, 1982 (FCC 82M-2382), the Presiding Judge granted summary decision of the air hazard issue in PTA's favor. The Presiding Judge also issued an Order on December 29, 1982 (FCC 82M-4159, released January 3, 1983) granting summary decision in Cascade's favor of the site availability issue.

4. Prehearing conferences were held on July 16, 1982 and October 4, 1982. Hearing sessions were held in Washington, D.C. on January 4, 5 and 6, 1983 and a further hearing session held on June 3, 1983. The record was closed on June 3, 1983.[3]

5. Proposed Findings of Fact and Conclusions of Law were filed by PTA and Cascade, and each applicant filed a Reply.

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[2] In the interests of brevity, only the issues designated against those applicants still a party to this proceeding will be set forth below.

[3] By Motion to Reopen the Record and to Enlarge the Issues filed by Cascade on November 10, 1983, it seeks to reopen the record in this proceeding and to enlarge the issues to include the following: To determine

1. Whether Portland Television Associates, Ltd. has misrepresented facts and/or lacked candor regarding its integration proposal;
2. Whether Portland Television Associates, Ltd. has misrepresented facts and/or lacked candor regarding the media interests of Media Central, Inc. and Forrest Preston; and
3. Whether Portland Television Associates, Ltd. misrepresented facts, and lacked candor and/or violated Section 73.3514 of the Commission's Rules in failing to disclose its plans to syndicate out its ownership or to have its station professionally managed.

Even if we assume that the motion has merit and that further inquiry following designation of the proposed issues would result in findings adverse to PTA, such findings would not alter the decision set forth below awarding the license for Channel 40 to Cascade. Accordingly, the motion will be denied.

Findings of Fact

Cascade

6. Cascade is a partnership formed for the purpose of applying for Channel 40 in Portland, Oregon. The sole general partner of Cascade is Cascade Video, Inc., an Oregon corporation, which in turn is a wholly owned subsidiary of General American Theatres, Inc. (General American) (Cascade Exhibit 1).

7. Thomas P. Moyer and his wife, Marilyn Moyer, each own 25.5 percent of General American. Their children, Thomas P. Moyer, Jr., Timothy Moyer, Kimberly Moyer Kassab, and Colleen Moyer Thrift are the beneficial owners of the remaining 49 percent of General American, each owning 12.5 percent interest as the beneficiaries of a trust (Cascade Exhibit 1).

8. Cascade's limited partners are all Portland residents. They are: Clifford Alterman (2.5 percent limited partner); Ralph P. Schlesinger (5 percent limited partner); H.A. Anderson (5 percent limited partner); R.W. deWeese (5 percent limited partner); and Cascade Video, Inc. (45 percent limited partner). In addition, there is a 15 percent limited partnership interest in Cascade which is unsubscribed. Walter Aman has been designated to receive 5 percent of this special limited partnership interest (Tr. 69), and the remaining 10 percent interest will be given to managerial employees of Cascade as bonus compensation and may only be held by residents of the Portland area (Cascade Exhibit 1; Tr. 71-72).

Diversification

9. None of the principals of Cascade or General American have any ownership interest in any radio or television station, television system, print media, or any related company (Cascade Exhibit 1).

10. As noted above, Thomas P. Moyer and his wife, Marilyn, each own 25.5 percent of General American, which is principally engaged in the movie exhibition business. (Cascade Exhibit 1). In addition, Mr. and Mrs. Moyer jointly own Eastgate Theatre Corporation, Broadway Theatres and Oregon Washington Theatre Corporation, all of which are also in the business of exhibiting motion pictures (Tr. 47-50). General American owns two theatres in the Portland, Oregon market and two theatres in Vancouver, Washington, which borders Portland (Tr. 48). Eastgate operates four or five theatres in Portland, with one or two serving the Portland area (Tr. 47). Broadway Theatres owns approximately 14 theatres, some of which are also located in Portland (Tr. 49), and the Oregon Washington Theatre Corporation operates three theatres in Portland and two in Eugene, Oregon (Tr. 49-50). The Moyers' own a total of 74 theatres (Tr. 51).

Integration

11. Thomas P. Moyer will be the general manager of Channel 40. As general manager, Mr. Moyer will be responsible for the overall performance of the proposed station and for its finances, long-range planning, and capital expenditures as well as the station's compliance with its regulatory responsibilities. Mr. Moyer will devote at least 30 hours a week to these duties (Cascade Exhibit 2).

12. Marilyn Moyer, Thomas P. Moyer's wife, will be the full-time business manager of the station, with responsibility for supervising the accounting and bookkeeping, and the advertising for the station as well as its promotion. Mrs. Moyer will also oversee all personnel matters and will be responsible for the hiring of the station's staff (Cascade Exhibit 3).

Local Residence/Civic Participation

13. Thomas and Marilyn Moyer currently reside in Portland, Oregon. Thomas Moyer has lived in Portland all his life, and Marilyn Moyer has lived in Portland since 1946 (Cascade Exhibits 2 and 3). Mr. Moyer is active in P.A.S.S., a local service organization, that serves as a counseling agency for persons with personal, financial or medical problems. He has also supported and has participated in local efforts to preserve historic buildings, has been a member of the Mayor's Committee on Central Traffic Planning, and has participated in local political campaigns. Thomas Moyer has been a member of the Portland Chamber of Commerce for a number of years, and was a director of the Oregon Museum of Science and Industry (Cascade Exhibit 2). Mr. Moyer is also a supporter of amateur boxing, and is a life member of the Multnomah Athletic Club (Cascade Exhibit 2).

14. Marilyn Moyer has been a member of the Portland Chamber of Commerce for 16 years. In addition, she has been involved in community fund raising activities for her local church, has been active in several Parent and Teacher Associations, and has served as a Den Mother for the Cub Scouts (Cascade Exhibit 3).

15. The Moyers have made the theatres operated by General American available approximately 30 times a year to various charitable organizations, free of charge, and General American has absorbed all the costs associated with these fund raising activities (Cascade Exhibit 3).

PTA

16. PTA is a limited partnership organized under the laws of the State of Tennessee. The partnership is composed of three general partners and one limited partner. The general partners are Aubrey Burke who owns 25 percent of the stock, Forrest L. Preston who owns 25 percent, and Carl W. Campbell with 25 percent. The sole limited partner is Philip B. Brooks who also owns 25 percent of the stock (PTA Exhibit 1).

Diversification

17. PTA has no ownership interest, either legal or beneficial, direct or indirect, in any existing outlet of mass communications (PTA Exhibit 1). Of its individual partners, only Forrest L. Preston has such an interest. Mr. Preston is a member of the Board of Directors and owns 8.82 percent of the stock of Media Central, Inc., a corporation with interests in broadcasting facilities (PTA Exhibit 1). As of February 10, 1982, the deadline for filing amendments as a matter of right in this proceeding, Media Central held the following media interests: a 40 percent partnership interest in Morton J. Kent and Media Central, Inc. d/b/a Canton 67, a partnership, which is the permittee of a television broadcast station to serve Canton, Ohio on Channel 67; a 100 percent ownership interest in the construction permit for a television station to serve the community of Honolulu, Hawaii on Channel 20; a 60 percent partnership interest in the construction permittee of KEKR-TV, Channel 62, Kansas City; a 34 percent partnership interest in the construction permittee of KBSI-TV, Channel 23, Cape Girardeau, Missouri, with an option to acquire an additional 26 percent interest in KBSI-TV; and a 45 percent partnership interest in the permittee for a UHF television station in Huntsville, Alabama with an option to acquire an additional 10 percent interest (PTA Exhibit 1).

Integration

18. Aubrey Burke, who owns 25 percent of PTA, will serve as general manager of the station working a minimum of 40 hours a week (PTA Exhibit 3). Forrest L. Preston, who also owns 25 percent, will serve as full-time station manager of the proposed station (PTA Exhibit 4), and Carl W. Campbell, with a 25 percent interest, will serve as part-time program director, devoting 20 hours a week to his duties at the station (PTA Exhibit 5).

Local Residence/Civic Participation

19. Aubrey Burke who proposes to be integrated on a full-time basis as general manager, has resided in and around Portland, Oregon for the past 25 years. From 1951 through 1953, and for the past 10 years, Mr. Burke has been a resident of Portland and has been active in various professional organizations in that community (PTA Exhibit 3).

20. Mr. Preston will move to Portland in the event that PTA is the successful applicant. From 1951 to 1952, and from September 1956 to March 1957, Mr. Preston was a resident of Portland, Oregon (PTA Exhibit 4).

21. Mr. Campbell plans to maintain a home in Portland, but will continue to keep his principal residence in Wenatchee, Washington (Tr. 392, 381-382). During 1971 and 1972, Mr. Campbell resided in Lake

Oswego and Oregon City, Oregon, which are both suburbs of Portland, Oregon (PTA Exhibit 5).

Antenna Site Issue

22. A transmitter site availability issue was designated against both PTA and Cascade. Although the issue was resolved in Cascade's favor by a grant of a motion for summary decision (Memorandum Opinion and Order, FCC 82M-4159, released January 3, 1983), as of the date of the commencement of the hearing in this matter, the issue was still outstanding against PTA. At the hearing session held on January 6, 1983, PTA tendered a document, received into evidence as PTA Exhibit 7, which stated that PTA was still attempting to negotiate space on the KLRK-TV tower, and added that "[A]t the present time, discussions with representatives of KLRK have indicated that it appears that KLRK's proposed tower would not be available for PTA's use as an antenna-supporting structure, due to its having already been 'filled to capacity'" (PTA Exhibit 7). PTA did not offer any additional evidence addressing the site availability issue. The record was first closed on January 11, 1983 by Order released on January 13, 1983 (FCC 83M-156).

23. By Order released on April 18, 1983 (FCC 83M-1279), the record in this proceeding was reopened and a post-hearing amendment to the engineering portion of PTA's application accepted. The amendment reflects a reduction in the height of PTA's proposed tower and an affidavit of PTA's consulting engineer in which he states that the original site coordinates for PTA's antenna were incorrect; and that the error in the site coordinates was not detected until the proposed antenna site was replotted on a larger scale map which he received on January 6, 1983. He indicates further that the new, corrected coordinates for PTA's antenna site are identical in every respect to the antenna site coordinates submitted by TS-3 Communications, Inc. (TS-3), a former party applicant to this proceeding.

24. Cascade opposed the acceptance of the amendment and continues to argue that PTA must be disqualified and its application dismissed, since it failed to address the antenna site availability issue at the hearing. PTA submits that the record in this proceeding establishes that PTA's proposed antenna site is identical to that of TS-3 which has been found to be in compliance with the terms of an ordinance adopted by Multnomah County, Oregon; and that its qualifications to be a Commission licensee have, therefore, been established.[4]

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[4] TS-3's antenna site by Order released January 3, 1983 (FCC 82M-4160), was found to conform with the requirements of the Multnomah County, Oregon ordinance, and summary decision in TS-3's favor of the site availability issue was granted in the same Order.

25. The accuracy of the new site coordinates for PTA's proposed antenna is not directly challenged by Cascade. Cascade's objection appears to be directed to the fact that it was denied the opportunity to cross-examine PTA's engineer with respect to the truthfulness of his statement as to when the error was discovered. It also disputes PTA's claim that good cause has been shown for accepting an amendment to its engineering proposal after the record was closed in this proceeding.

Conclusions of Law

Antenna Site Issue

26. PTA's technical proposal was not substantially altered by the amendment received on April 18, 1983. Furthermore, Cascade has not been prejudiced in any way by the acceptance of the post-hearing amendment. Its claim that it has been prejudiced by being denied the opportunity to cross-examine PTA's engineer is without merit. As noted above, the accuracy of the new site coordinates is not in dispute. Although Cascade questions the truthfulness of PTA's assertion as to when the error was discovered, the Presiding Judge concludes that PTA had no motive to misrepresent the date it discovered the error, since it was clearly in its own best interests to correct the error as soon as possible. Therefore, no purpose would have been served by providing Cascade with the opportunity to cross-examine PTA's engineer.

27. The Presiding Judge finds, therefore, that Cascade has not been prejudiced in any way by the acceptance of PTA's post-hearing engineering amendment, and that the public interest was clearly served by accepting the amendment, since it has the effect of qualifying PTA to be a Commission licensee, thereby providing the Commission with a choice between two qualified applicants. There being no longer any material questions of fact as to whether or not PTA's antenna site conforms with the zoning requirements of Multnomah County, Oregon, summary decision in PTA's favor of the site availability issue is warranted.

Diversification

Cascade

28. As noted above, Thomas Moyer and his wife Marilyn each own 25.5 percent of the stock of General American which owns theatres in the Portland market (Tr. 48) and two more theatres in Vancouver, Washington which borders Portland. The Moyers' jointly own the Eastgate Theatre Corporation which owns four or five theatres in the City of Portland, with one or two more theatres serving the greater Portland SMSA area, the Broadway Theatres which owns approximately 14 theatres, some of which are located in Portland (Tr. 49), and the Oregon Washington Theatre Corporation which operates three theatres in

Portland and two in Eugene, Oregon (Tr. 49-50). The Moyers' own or have controlling interest in a total of 74 theatres (Tr. 51).

PTA

29. Mr. Preston is one of the eight directors of Media Central, Inc. and owns 8.82 percent of its stock (PTA Exhibit 1, p. 1). For comparative purposes, Media Central is charged with a 40 percent ownership interest in Morton J. Kent and Media Central, Inc. d/b/a Canton 67, a partnership, the permittee of a television broadcast station on Channel 67, Canton, Ohio (PTA Exhibit 1, pp. 1-2); a 100 percent ownership interest in another construction permit for a television station in Honolulu, Hawaii on Channel 20; a 60 percent ownership interest in the construction permit for Channel 62, Kansas City, Missouri; a 34 percent interest in the permittee of Channel 23, Cape Girardeau, Missouri with an option to acquire an additional 26 percent interest; and a 45 percent interest in the permittee for a UHF television station in Huntsville, Alabama, with an option to acquire an additional 10 percent interest.

30. Although the Commission has traditionally treated motion picture theatres as a medium of mass communications, see *Williamsport Radio Broadcasting Associates, Inc.*, 22 FCC 1204 (1957); *Barnes Enterprises, Inc.*, 69 FCC 2d 1957 (Rev. Bd. 1978), the Review Board in *Peoples Broadcasting Corporation* (*Decision*, FCC 83R-5, released January 25, 1983), noted that there is presently virtually no "use of newsreels or other informative non-entertainment matter at motion picture theatres", and concluded that movie theatres as a "medium of mass communications is even less significant to the Commission's diversification concerns as expressed in its *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 303, 394-395 (1965)." Mr. Preston's 8.82 percent ownership interest in Media Central and his position as one of eight directors on the Board of Directors of Media Central is, therefore, found to be of more significance under the diversification criterion than the Moyers' ownership and operation of motion picture theatres in the Portland area. Accordingly, Cascade is entitled to a diversification preference over PTA. The preference is, however, found to be moderate. As noted above, the Moyers' own and operate a number of motion picture theatres in Portland and in the greater Portland area, which, although of minor significance under the diversification criterion, must still be considered as media interests attributable to PTA. Furthermore, Mr. Preston's interest in Media Central is that of a minority stockholder in a company whose media interests are located at a considerable distance from Portland. Mr. Preston's position as one of eight directors of Media Central is of little comparative significance, since his voice in the management of Media Central is not necessarily a controlling one.

Integration

31. Cascade's only general partner is Cascade Video, Inc. which in turn is a wholly owned subsidiary of General American, of which Thomas and Marilyn Moyer jointly own 51 percent of the voting stock. The senior Moyers' majority voting stock interest in General American gives them control over Cascade Video, Inc., Cascade's sole general partner, with, therefore, ultimate authority to implement station policy decisions. See *Annax Broadcasting Inc.*, 87 FCC 2d 483 (1981). For purposes of determining the quantity of integration in Cascade's proposal under the integration criterion, each senior Moyer will be considered as owning 50 percent of the applicant. See *Cleveland Television Corporation*, 91 FCC 2d 1129 (Rev. Bd. 1982).

32. Cascade is entitled to a 50 percent full-time quantitative integration credit for its proposal to integrate Marilyn Moyer on a full-time basis into the affairs of the station. The quantitative integration credit awarded Mrs. Moyer is qualitatively enhanced by her long-term residence in Portland and her participation in the civic affairs of that community, and is further enhanced by her sex. Cascade is also entitled to a 50 percent substantial quantitative integration credit for its proposal to integrate Thomas Moyer's 30 hours a week into the affairs of the station. The credit awarded for Mr. Moyer is qualitatively enhanced by his life-long residence in Portland and his participation in that community's civic affairs.

33. PTA is entitled to a 66⅔ percent quantitative integration credit for its proposal to integrate on a full-time basis, two out of its three general partners. Both Mr. Burke and Mr. Preston propose to work full time at the station with duties that are clearly managerial and/or policymaking in nature. In addition, PTA is entitled to a 33⅓ percent part-time integration credit for its proposal to integrate Mr. Campbell into the affairs of the proposed station on a part-time basis.

34. Cascade questions the *bona fides* of Mr. Preston's and Mr. Campbell's commitment to be integrated into the affairs of the proposed station in view of their other business interests. The record, however, is devoid of any evidence which indicates that these interests will interfere with their ability and/or willingness to meet their respective commitments to the proposed station. In the absence of such evidence, Mr. Preston's and Mr. Campbell's announced intentions to be integrated into the affairs of the station, to the extent indicated in PTA's proposal, and to subordinate their other commitments to their respective commitments to the station, are accepted as evidencing their true intentions.

35. The quantitative integration credit awarded PTA for the participation of Mr. Burke in the affairs of the proposed station is enhanced to only a slight degree by the fact that although Mr. Burke is a long-term resident of Portland, his involvement in civic affairs in that community has been

limited to professional organizations and a local credit union. The quantitative integration credit awarded PTA for Mr. Preston is enhanced to a very slight degree by his prior contacts with the Portland area and his announced intention to move to Portland in the event that PTA is the successful applicant. Mr. Campbell's part-time integration credit is enhanced to a very slight degree by his prior contacts with the Portland area.

Ultimate Conclusions

36. The Presiding Judge finds that Cascade is entitled to a moderate diversification preference over PTA.

37. The Presiding Judge further finds that PTA is entitled to only a slight integration preference over Cascade. As noted above, PTA proposes to integrate 66⅔ percent of its ownership on a full-time basis as opposed to Cascade's intention to integrate 50 percent of its ownership on a full-time basis. The difference in the quantity of the full-time integration between the two applicants is only 16⅔ percent, a relatively small percentage. Furthermore, Cascade's full-time integration credit is enhanced by a local residence credit with a significant involvement in the civic affairs of the Portland community and by the fact that Cascade's integrated principal is a female. Only 33⅓ percent of PTA's full-time quantitative integration credit is entitled to local residence credit which is diminished to a moderate degree by the fact that the involvement of PTA's principal in the civic affairs of the Portland community has been limited to professional organizations and a credit union, which have not been shown to be serving the general public. Although PTA is entitled to an additional 33⅓ percent full-time quantitative integration credit for the participation of Mr. Preston in the management of PTA's proposed station, this credit is qualitatively enhanced to only a very slight degree by Mr. Preston's intention to move to Portland in the event that PTA is the successful applicant, and is of considerably less comparative significance than the enhancement to which Cascade's full-time integrated principal is entitled.

38. In addition, as noted above, Cascade is entitled to a 50 percent substantial integration credit which is enhanced in the manner described above, whereas PTA merits merely an additional award of a 33⅓ percent part-time integration credit. The substantial integration credit awarded Cascade, although less significant than full-time integration credit, is more significant than the part-time integration credit awarded PTA. See *Midwest Broadcasting Company*, 70 FCC 2d 1489 (Rev. Bd. 1979).

39. The Presiding Judge finds, therefore, that the moderate diversification preference awarded Cascade outweighs PTA's slight integration preference; that Cascade has demonstrated that its proposal will best serve the public interest; and that the license for a construction permit for

a new commercial television station to operate on Channel 40 in Portland, Oregon will be awarded to Cascade.

Rulings

40. IT IS ORDERED that the Motion to Reopen the Record and to Enlarge the Issues filed by Cascade Video of Oregon, Ltd. on November 10, 1983 IS DENIED.

41. IT IS FURTHER ORDERED that summary decision IS GRANTED in Portland Television Associates, Ltd.'s favor of the antenna site availability issue designated against Portland Television Associates, Ltd. in the Hearing Designation Order released on May 12, 1982, and Portland Television Associates, Ltd. IS FOUND to be qualified to be a Commission licensee.

42. AND IT IS FURTHER ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Commission's Rules, 47 C.F.R. 1.276, the application of Cascade Video of Oregon, Ltd. (BC Docket No. 82-254, File No. BPCT-811019KG) for a new commercial television station to operate on Channel 40 in Portland, Oregon IS GRANTED; and the application of Portland Television Associates, Ltd. (BC Docket No. 82-256, File No. BPCT-811217KJ) IS DENIED.[5]

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH P. GONZALEZ, *Administrative Law Judge*

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[5] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Common Carrier, Authorization
Common Carrier, Rates, Charges
Competition, Common Carriers

Sixth Report and Order adopted regarding policy and rules concerning rates for competitive common carrier service and facilities authorizations.

—Competitive Carrier Services
CC Docket No. 79-252

FCC 84-566

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor	CC Docket No. 79-252

SIXTH REPORT AND ORDER

Adopted: November 21, 1984; Released: January 4, 1985

BY THE COMMISSION: COMMISSIONER RIVERA ISSUING A SEPARATE STATEMENT.

I. Introduction

1. Through the Competitive Carrier Rulemaking[1] which began in 1979, the Commission has reduced or eliminated unnecessary regulatory

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[1] Policy and Rules Concerning Rates and Facilities Authorizations for Competitive Carrier Services (CC Docket No. 79-252), Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979), First Report and Order, 85 FCC 2d 1 (1980), (*First Report*), Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981), (*Further Notice*), Second Report and Order, 91 FCC 2d 59 (1982), (*Second Report*), *recon..* FCC No. 83-69, released March 21, 1983, Second Further Notice of Proposed Rulemaking, FCC No. 82-187, released April 21, 1982, Third Further Notice of Proposed Rulemaking, Mimeo No. 33547, released June 14, 1983, 48 Fed. Reg. 28,292 (June 21, 1983), Third Report and Order, Mimeo No. 012, released October 6, 1983, 48 Fed. Reg. 46,791 (October 15, 1983), Fourth Report and Order, 95 FCC 2d 554 (1983), (*Fourth Report*), Fourth Further Notice of Proposed Rulemaking, FCC No. 84-82, released March 22, 1984, 49 Fed. Reg. 11,856, (March 28, 1984), (*Fourth Further Notice*), Fifth Report and Order, FCC No. 84-394, released August 27, 1984, 49 Fed. Reg. 34824, September 4, 1984, (*Fifth Report*). (Competitive Carrier Rulemaking)

burdens on non-dominant common carriers, those facing strong competition in the marketplace. As to certain of these non-dominant carriers, the Commission decided that they could be treated by forbearance because the Section 208 complaint process, market forces and the Commission's power to reimpose tariff filing and facilities authorization requirements were sufficient to check these carriers' ability to charge unjust, unreasonable or discriminatory rates.[2] Thus, carriers subject to forbearance are not required to file tariffs or to obtain Section 214 approval for acquisition of domestic communication facilities.[3] In the *Fourth Further Notice* in this rulemaking, we sought to determine whether it would be in the public interest to discontinue the maintenance of forborne carrier tariffs at the Commission. We proposed that these forborne carrier tariffs be cancelled to dispel any idea of a Commission "stamp of approval," to avoid unnecessary application of traditional regulatory tools which might inhibit development of competition and to reduce administrative costs. This proposal, if adopted, would result in the cancellation of all forborne carrier tariffs currently on file at the Commission and would eliminate future federal tariff filings by carriers treated by forbearance.

2. Eighteen parties filed comments in response to the *Fourth Further Notice* and ten parties filed reply comments.[4] These comments reflected

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[2] In the *Second Report*, the Commission decided to forbear from requiring tariffs or facilities applications from terrestrial resellers. In the *Fourth Report*, the Commission determined that it would treat by forbearance the specialized common carriers and all resellers, including the domestic satellite resellers, resellers owned by or affiliated with exchange telephone companies and domestic record carrier resellers not covered by the interconnection requirements of the Record Carrier Competition Act. [Pub. L. No. 97-130, 95 Stat. 1687 (1981), 47 U.S.C. § 222.] In the *Fifth Report*, the Commission decided to include the following types of carriers in the forborne category: domestic satellite carriers providing domestic interstate services, miscellaneous common carriers, carriers providing domestic, interstate and interexchange digital transmission networks (DEMS systems) and affiliates of exchange carriers providing interstate, interexchange services. The term "forborne carrier" used in this Order pertains to all carriers noted above and any carriers deemed to be treated by forbearance in the future through the Competitive Carrier Rulemaking.

[3] A tariff filing option for forborne carriers was established in the *Second Report*, 91 FCC 2d at 74 and repeated in the *Fourth Report*, 95 FCC 2d at 34 and the *Fifth Report*, 49 Fed. Reg. at 34831. The Commission stated ". . . that carriers treated by forbearance as defined in this order are given permission to cancel their tariffs on file with this Commission."

[4] The following parties filed comments: Aeronautical Radio, Inc. (ARINC), American Satellite Company (ASC), Association of Long Distance Telephone Companies (ALTEL), E.L.A. Cooperative (ELA), GTE Sprint Communications Corporation (GTE Sprint), International Business Machines Corporation (IBM), International Communications Association (ICA), Lexitel Corporation (Lexitel), MCI Telecommunications Corporation (MCI), Network I, Inc. (Network I), PACNET Communications Corporation (PACNET), RCA American Communications (RCA), Satellite Business Systems (SBS), State of Hawaii (Hawaii), Tele-Link Communications, Inc., Netcom International, Inc. and

both support for and opposition to the Commission proposal described in the *Fourth Further Notice.* After careful consideration of the record assembled and for the reasons set forth below, we have concluded that the public interest and the goals of the Communications Act would best be promoted by cancellation of all forborne carrier tariffs on file at the Commission within six months of the effective date of this Order.[5]

II. Comments

3. In opposition to the *Fourth Further Notice* proposal, commenters argued that the Commission lacks statutory authority to cancel forborne carrier tariffs. Several commenters referred to Section 203(a) of the Communications Act, 47 U.S.C. §203 (a), and asserted that this provision requires common carriers to file tariffs.[6] Comments also cited Section 203(c), 47 U.S.C. §203(c), as evidence that a carrier is prohibited from providing common carrier services unless it has a tariff on file.[7] Some

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Compact Video Services, Inc. (Earth Station Operators), Teltec Saving Communications Co. (Teltec), Telecommunications Research and Action Center and National Association for Better Broadcasting (TRAC) and United States Transmission Systems, Inc. (USTS). Reply comments were filed by: Ad Hoc Telecommunications Users Committee (Ad Hoc), ALTEL, American Telephone and Telegraph Company (AT&T), GTE Sprint, Hawaii, IBM, ICA, MCI, PACNET and TRAC. GTE Sprint, Network I and ALTEL filed separate petitions for leave to file late comments in this proceeding. These carriers separately supported their petitions with a showing of good cause and stated that no parties opposed these petitions. For these reasons, we grant the petitions of GTE Sprint, Network I and ALTEL and accept their late-filed pleadings.

[5] Ad Hoc filed a Motion for Additional Pleading Cycle on the final day of the reply comment period. Ad Hoc argued in support of its Motion that the *Fourth Further Notice* "appeared to be purely ministerial in nature and that initial comments to the *Fourth Further Notice* raised important legal and policy questions as to the Commission's authority to subject certain carriers to forbearance and to the relationship between contracts and tariffs." As indicated in paras. 12 - 14 of this Order, the Commission has established its authority for forbearance in the *Further Notice* and has requested and reviewed public comment at each decision step of the Competitive Carrier Rulemaking. For these reasons, we deny Ad Hoc's Motion for an Additional Pleading Cycle.

[6] Section 203 (a) provides in pertinent part that "Every common carrier, shall file with the Commission . . . schedules showing all charges for itself and its connecting carriers . . . ." ALTEL also argued that the courts have uniformly held that common carriers are required to file tariffs with the Commission and cited the following cases: American Telephone & Telegraph Co. v. FCC, 572 F.2d 17, 25 (2d Cir. 1978); Essential Communication v. American Telephone & Telegraph Co., 446 F. Supp. 1090, 1096 (D.N.J. 1978); American Telephone & Telegraph Co. v. Florida-Texas Freight, Inc., 357 F. Supp. 977, 979 (S.D. Fla. 1973); Carter v. American Telephone & Telegraph Co., 365 F.2d 486, 496 (5th Cir. 1966). Teltec cited Bell Telephone Company of Pennsylvania v. FCC, 503 F.2d 1250 (3d Cir. 1974), *cert. denied,* 422 U.S. 1026 (1975), to support its contention that carriers must operate by tariff unless otherwise authorized by the Act.

[7] This section states in part, "No carrier . . . shall engage or participate in such communication unless schedules have been filed . . . and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation, for such

commenters maintained that, although the Commission had discretion pursuant to Section 203(c) to modify certain statutory requirements such as notice periods, it could not abrogate its responsibility to accept tariffs for filing.[8] Commenters also rejected the idea of substituting contracts or other arrangements for tariffs.[9]

4. Further statutory arguments centered around the Commission's obligation to regulate rates under the mandates of the Act.[10] Not only did commenters emphasize that carriers without tariffs on file would be tempted to depart from just and reasonable ratemaking, but they also argued that the Commission would be effectively eliminating public review of carrier rates and rate information essential to the proper administration of the Section 208, 47 U.S.C. § 208, complaint process. Commenting parties stated that the required tariff filings foster carrier compliance with the Act and allow the Commission to accumulate valuable information for the informal monitoring of carrier ratemaking and of industry trends. USTS submitted that if the Commission proposal were adopted, carriers would still have to develop rate support and justification in order to be prepared for any subsequent Commission inquiry.

5. Commenters also raised concerns as to whether the proposed cancellation of forborne carrier tariffs would have an adverse effect on

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communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect . . . ."

[8] The commenters argued that the pertinent part of Section 203 (c) that gives the Commission this discretionary authority is "No carrier, *unless otherwise provided by or under authority of this Act*, shall engage or participate in such communication unless schedules have been filed . . . ." (Emphasis added.) Commenters cited the following cases to support this argument: AT&T v. FCC, 487 F.2d 864 (2d Cir. 1973) and AT&T v. FCC, 503 F.2d 612 (2d Cir. 1974). USTS cited Farmers Union Central Exchange, Inc. v. FERC, Nos. 82-2412 et al., Slip op. at 36, (D.C. Cir. March 9, 1984) for the view that "Discretion must be bridaled in accordance with statutory mandate."

[9] MCI cited the *Armour Packing* case for the principle that a tariff rate is the only legal rate and no indirect and uncertain methods of ratemaking could be substituted. Armour Packing Company v. United States, 209 U.S. 56, 81 (1912). It also cited the following cases in support of its argument that contracts could not be substituted for tariffs and that statutory obligations could not be shirked: Resale and Shared Use, 60 FCC 2d 261, 314 (1976), *recon.*, 62 FCC 2d 588 (1977), *aff'd sub nom.*, AT&T v. FCC, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 675 (1978); Midwestern Relay Company, 69 FCC 2d 409, 415 (1978); American Broadcasting Cos, Inc. v. FCC, 643 F.2d 818, 826 (D.C. Cir. 1980). Teltec asserted that there were no substitutes for tariffs and that the Communications Act did not contemplate that carrier-customer relations be governed by contract. United Video, Inc. 55 FCC 2d 516, 517-18 (1975).

[10] The comments cited the following sections of the Act: 47 U.S.C. §§ 151, "to regulate interstate and foreign commerce in communication . . . with adequate facilities at reasonable charges . . ."; 201(a), ". . . to furnish such communication service upon reasonable request"; 201(b), "All charges . . . shall be just and reasonable . . ." and 202(a), ". . . unlawful for any common carrier to make any unjust or unreasonable discrimination in charges. . . ."

consumers and whether the Commission had sufficiently analyzed how the public might be affected by elimination of these filings.[11] They urged the Commission to retain these tariffs, arguing that the public benefits associated with them far outweigh any burdens on the Commission staff. One major benefit, according to the commenters, is the provision of a central resource point where the public can readily obtain information on carrier rates and charges. The commenters argued that the public needs this information in order to detect discriminatory practices, to challenge new or changed tariff rates and to compare service offerings. Several commenters contended that researchers, consumer advocates, reporters and analysts need this resource center to facilitate the collection of data in order to digest and simplify it for consumers.[12] They considered the option of obtaining information at the carrier's premises to be inadequate because information would be available only at the carrier's discretion and a carrier's public offices are sometimes difficult to identify. With the advent of equal access and other new carrier-customer relationships, commenters claimed that an increase in the availability of specific tariff information was necessary.

6. In addition to the burden which would be placed on the public by the proposed tariff cancellation, the commenting parties insisted that this action would increase burdens on carriers substantially. They argued that carriers would sustain increased administrative costs to negotiate contracts with individual customers and to replace certain protections that they believe the tariff filing process currently affords them.[13] USTS contended that administrative convenience would be lost because the

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[11] TRAC asserted that the Commission did not give adequate consideration to the public benefits of forborne carrier tariff filings and likened this situation to the Commission's action of eliminating program logs for radio stations. Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C.Cir. 1983). TRAC pointed out that the Court in this case remanded the issue of what information must be made available to the public.

[12] Network I recognized that the Commission information would not be comprehensive since some forborne carriers (*i.e.* resellers) are not presently filing tariffs due to the *Fourth Report's* relaxation of this requirement. Even without total information, however, Network I asserted that the tariffs filed at the Commission provide ready access to the most information available in one central location.

[13] For example, PACNET asserted that a carrier would lose instant identification as a common carrier upon the cancellation of its tariffs at the Commission. PACNET also argued that contracts would be governed under state laws which sometimes allow five years for recovery of undercharges or overcharges by carriers or their customers versus the two years liability for such actions allowed by federal law. Tele-Valuation, Inc. v. AT&T, 73 FCC 2d 450 (1979). GTE Sprint stated that "mandatory detariffing of interstate services would place interexchange carriers in the anomalous position of having to offer the interstate portions of their services on a non-tariffed basis while their intrastate services would be subject to tariff requirements that varied from state to state."

Commission proposal, if adopted, would remove uniform guidelines for tariffs and encourage disparate tariff filing requirements at the state level.

7. Many parties suggested that less drastic measures could be taken to effectuate the competitive and administrative goals outlined in the *Fourth Further Notice.* Several commenters alleged that cancellation of forborne carrier tariffs would not, in fact, result in significant cost reductions to the Commission.[14] They argued that any cost savings would be offset by additional costs incurred as a result of increased investigations of complaints, increased staff time spent responding to individual customer inquiries and increased time required to review petitions for rulings on discriminatory practices. These commenters suggested several alternatives which would reduce Commission staff time and storage space without requiring the cancellation of tariffs. Commenters recommended that forborne carriers undertake increased obligations by themselves updating tariffs which they choose to keep on file at the Commission. Furthermore, they suggest, these tariffs could be provided in a more compact form such as on microfilm, floppy disks or tapes. The cost of any equipment needed to use a new tariff filing format could be passed on to the public and the carriers by way of a nominal fee, according to the commenting parties. They also recommended that a simplified tariff form under Part 61 of the Commission's Rules be created for forborne carriers.[15] Other commenters suggested that the Commission could relieve its administrative burden by requiring carriers to provide only a current copy of each tariff to the Commission and to maintain the total tariff history at their own premises; by resolving the proceedings before it regarding detariffing of special construction services and streamlining of recordkeeping;[16] and finally, by requiring carriers to keep their general tariff terms and conditions on file for public reference but allowing them to specify rates on an individual customer basis.

8. With respect to the Commission's argument that allowing forborne carriers to continue to keep tariffs on file might mislead the public, the commenters recommended that a boldfaced disclaimer be placed on the front of each tariff proclaiming that the tariff is on file for informational purposes only and has not been reviewed or approved by the Commis-

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[14] The commenters supporting this premise were: GTE Sprint, ICA, Lexitel, MCI, Network I, Teltec, TRAC and USTS.

[15] MCI suggested that Commission rules related to cross-referencing (Section 61.74) and tariff form (Section 61.54) be relaxed for forborne carriers which would also result in the elimination of special permission applications for waiver of detailed procedural rules.

[16] PACNET cited CC Docket No. 84-369 on special construction and CC Docket No. 84-283 on the streamlining of recordkeeping requirements as proceedings that would eliminate unnecessary costs.

sion.[17] Moreover, commenters contended that the segment of the public seeking tariff information is knowledgeable about the tariff process and is aware of the Commission review policies. Some commenters suggested that the Commission has not misled the public because tariffs contain carrier-made rates rather than Commission-made rates and are presumed lawful without extensive Commission review. Several commenting parties suggested that if the *Fourth Further Notice* proposal were adopted, a phase-in period of six months to one year should be implemented to allow time for the establishment of new business practices and for the preparation, negotiation and execution of contracts to replace tariffs.[18] GTE Sprint also pointed out that time would be needed to alert other parties such as government agencies that limit procurements to carriers regulated by tariffs.[19]

9. Parties arguing in favor of the Commission's proposal in the *Fourth Further Notice*[20] commented that the continuing practice of accepting forborne carrier tariffs at the Commission was inconsistent with the prior decisions in the Competitive Carrier Rulemaking. In particular, they stated, the publication of rates and terms prior to their effective date inhibited development of a vigorously competitive market. They agreed that forborne carrier tariffs should be cancelled to eliminate confusion as to Commission review and approval and also to eliminate uncertainty of state regulatory commissions as to the scope of their interstate regulatory obligations and responsibilities. ARINC alleged that on several occasions carriers had refused its reasonable and specific service requests stating that their tariffs did not permit such services to be sold. ARINC concluded that these refusals constitute evidence of carriers' widespread reluctance to be exposed to the rigors of marketplace competition and thereby, frustrate Commission goals in the Competitive Carrier Rulemaking. Many commenters voiced their objections to carriers using tariffs to their market advantage by projecting the image of a Commission "stamp of approval." In addition, commenters cited the

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[17] The same commenters listed in note 14 *Supra* proposed the use of a disclaimer.

[18] Commenters favoring a phase-in period were: ASC, Earth Station Operators, GTE Sprint and RCA Americom.

[19] Hawaii urged that GTE Sprint be exempt from any detariffing requirement so that its tariffs could be monitored for compliance with rate-and-service integration conditions in the GTE/SPCC Acquisition Order, 94 FCC 2d 235 (1983). The *Fifth Report and Order*, 49 Fed. Reg. at 34828, responded directly to this request and GTE Sprint is required "to make reasonably available sufficient information about its rates and rate structures so that the State of Hawaii and the Commission can ascertain whether the carrier is complying with these conditions." The Commission did not specify the format of this information.

[20] The parties commenting in favor of this proposal were SBS, ELA, IBM, ARINC, AT&T and Earth Station Operators.

reduction in Commission staff time and storage space as a positive effect of the cancellation of these tariffs.

10. AT&T asserted in its reply comments that carriers cannot have "the trappings of regulatory approval without the reality of regulatory supervision."[21] According to AT&T, the Commission has broad authority to modify any requirements made by or under authority of Section 203, 47 U.S.C. § 203, and the Commission can use this broad discretion in deciding how to regulate the forborne carriers.[22] AT&T distinguished many of the cases cited by commenting parties as not relevant to the issues connected with the cancellation of forborne carrier tariffs.[23] AT&T also commented that the principal policy argument of the commenters opposed to the Commission proposal that the continued filing of tariffs will aid in the prevention of anti-competitive price discrimination was without merit and demonstrated a fundamental misunderstanding of the competitive process. The simple answer to this contention, AT&T asserted, is that a non-dominant carrier, by definition does not have "sufficient market power to be able to engage in improper price discrimination without suffering the discipline of the marketplace."[24] In conclusion, AT&T contended that if carriers are to enjoy the advantages of a competitive marketplace, they must also bear some of the responsibilities and costs.

III. Discussion

11. After serious consideration of all issues raised by the commenters, the Commission has decided to exercise its authority to order the cancellation of forborne carrier tariffs. We are not persuaded by the commenters' arguments that the retention of forborne carrier tariffs is

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[21] AT&T comments at page 1.

[22] AT&T stated that this statutory language interpretation is squarely supported by AT&T v. FCC, 503 F.2d 612 (2d Cir. 1974).

[23] For example, AT&T argued that *Armour Packing,* see note 9 *Supra,* was patently distinguishable because the Interstate Commerce Act contained no general modification clause similar to Section 203(b)(2) in its statute and the Interstate Commerce Commission's power to cancel tariffs was not at issue. AT&T argued that the *Resale and Shared Use* decision, see note 9 *Supra,* only analyzed the general requirement that carriers should file tariffs and did not address the Commission's power to alter this requirement under Section 203 (b) (2). The Special Permission case, AT&T v. FCC, 487 F.2d 864 (2d Cir. 1973), was concerned with protecting carriers' freedom to change rates, and according to AT&T, the Commission's proposed action would, in fact, enhance that freedom. AT&T also asserted that MCI's discussion of cases involving the filing of customer-carrier contracts under the Communications Act is not related to the issues at hand because these cases concerned the relationship between the making of rates by tariffs and pre-existing contracts between the affected parties. (See note 9 *Supra* for cases cited.) Lexitel's reference to the legislative history of the Act's 1976 amendments is also irrelevant, according to AT&T, because it was concerned only with the Commission's power to alter the notice period.

[24] AT&T comments at page 6.

necessary to effectuate the goals and purposes of the Communications Act.[25] By ordering this cancellation, the Commission is in no way abdicating its oversight responsibility with regard to forborne carriers. This decision furthers our objectives to achieve just and reasonable rates in the marketplace. The Commission will continue to administer the Section 208 complaint process and will reimpose tariff requirements if necessary.[26] Carriers have an obligation to keep material on file at their offices that can be produced readily upon inquiry from the Commission in order to substantiate the reasonableness and justness of their rates, terms and conditions. Specific requirements for document retention are described below in paragraph 25.

12. The Commission thoroughly considered the statutory and public benefit arguments raised by the commenting parties in several steps of this Competitive Carrier Rulemaking.[27] The regulatory objectives of the Commisson as stated in Section 1 of the Communications Act, 47 U.S.C. § 151, are to assure that communications service is widely available to the public, efficiently produced and reasonably priced. It is well established that the Commission has "broad discretion in choosing how to regulate."[28] Sections 201 through 205 and 214 of the Act were enacted to control monopoly abuse or imprudent investments by the carriers which could impose increased costs on consumers. We have previously stated that non-dominant carriers have insufficient market power to engage in activities that Congress sought to prevent.[29] Section 203 (b)(2), 47 U.S.C. § 203

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[25] Although carrier opposition to the cancellation of tariffs must be given considerable weight, it is the "ultimate consumer 'who pays for the inefficiencies and restrictions created by tariffs.' " *See* National Small Shipments v. Civil Aeronautics Board, 618 F.2d 819, 826 (D.C. Cir. 1980) (*National Shipments*).

[26] Pending before the Commission is a Petition for Reconsideration and Clarification of the Fifth Report and Order filed by Showtime/The Movie Channel, Inc. which seeks, *inter alia*, clarification of the standards and procedures used in the Section 208 complaint process. We will address this petition in a separate Reconsideration of the Fifth Report.

[27] See *Further Notice of Proposed Rulemaking*, 84 FCC 2d at 478-91, *Second Report and Order*, 91 FCC 2d at 65-70 and *Fifth Report and Order*, 49 Fed. Reg. at 34827. We do not agree with commenters' contentions that the cases cited in note 6, *Supra*, support a statutory mandate for tariffs to be filed. These cases consider the issue of when a tariff conclusively and exclusively controls the rights and liabilities between parties and how a tariff differs from a contract. See *AT&T v. Florida-Texas Freight, Inc.* at 979.

[28] 572 F.2d at 26. *See also* discussion of legal considerations in the *First Report*, 85 FCC 2d at 12, and *Further Notice*, 84 FCC 2d at 473 and n.56.

[29] *Further Notice*, 84 FCC 2d at 458. Firms lacking market power have no ability or incentive to charge unlawful rates. Customers can always obtain service from competitors if rates exceed prevailing market prices. "The pattern of the legislative history, although not wholly unambiguous, gives strong support to the Congressional intent we have inferred from the language of the Act." *Id.* at 462. Federal Communications Commission: Hearings on H.R. 8301 Before the Committee on Interstate and Commerce, 73d Cong. 2d Sess. 15 (1934). The Study of Communications by an Interdepartmental

(b)(2), gives the Commission the express authority to exempt carriers from tariff filing requirements where appropriate.[30] In the *Further Notice,* we determined that the plain meaning of the statutory language allowed the Commission to modify any requirement of the section and that no clear evidence of contrary legislative intent existed.[31] In addition to § 203 (b)(2) of the Act, we relay on the broad exemptive language contained in § 203 (c)(1), 47 U.S.C. § 203 (c)(1), as authority for forborne carrier tariff cancellation.[32] Furthermore, we have determined that tariffs are not essential to our ability to ensure that non-dominant carriers do not unjustly discriminate in their rates. We have other means to ensure our enforcement of mandates of the Act.[33] In particular, we shall continue to investigate and adjudicate complaints under Section 208.[34] Pursuant to

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Committee, Report of the Secretary of Commerce, 1934 and Preliminary Report on Communications, H. Rep. No. 1273, 73d Cong., 2d Sess. (1934) were discussed in the *Further Notice* at 459-62.

[30] The statute states in pertinent part: "The Commission, may, in its discretion and for good cause shown, modify any requirement made by or under authority of this section either in particular circumstances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than ninety days."

[31] See *Further Notice,* 84 FCC 2d at 462, 479. Court interpretations of this section have not limited our authority with respect to the action undertaken herein. See AT&T v. FCC, 503 F.2d 612, 617 (2d Cir. 1974), in which the court determined: "We can only conclude that the plain language employed was intended to mean what it says. The legislative history in no place at all indicates any intent to give the FCC only the power to reduce the notice period."

[32] See *Further Notice,* 84 FCC 2d at 481. Section 203 (c)(1), in pertinent part, provides: "No carrier, *unless otherwise provided by or under authority of this Act,* shall engage in or participate in such communication unless schedules have been filed and published in accordance with the provisions of the Act. . . ." [emphasis added]

[33] It is apparent that as a result of Commission decisions and the Modified Final Judgment, [United States v. American Telephone and Telegraph Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 103 S. Ct. 1240 (1983)], the telecommunications industry structure today is drastically different from the one that existed in 1934 when the Communications Act was enacted. Throughout this rulemaking, we have determined that enforcement of Section 201 and 202 objectives of just and reasonable rates could be effectuated for certain carriers without the filing of tariffs and through market forces and the administration of the complaint process. We, therefore, believe that our actions ensure the perpetuation of the public interest objectives of the Act. See Farmers Union Central Exchange, Inc. v. FERC, Nos. 82-2412 et al., Slip op. at 49 (D.C. Cir. March 9, 1984), which states that "Moving from heavy to lighthanded regulation within the boundaries of an unchanged statute can, of course, be justified by a showing that under the circumstances the goals and purposes of the statute, will be accomplished through substantially less regulatory oversight."

[34] Very few complaints have been filed against non-dominant carriers and those complaints that have been reviewed by the Commission have been found to be without merit. See *Fourth Report,* 95 FCC 2d at 578, n.79 and *Fifth Report,* 49 Fed. Reg. at 34825-26 and n.17. It also should be noted that approximately twenty forborne carriers have cancelled

this complaint process or upon our own determination, we can require the filing of the rates, charges, terms and conditions utilized by a carrier in the course of its business to ascertain whether a carrier is in violation of any section of the Act. In addition, carriers and non-carrier customers can enter into contracts, agreements and arrangements, and under Section 211 of the Act, 47 U.S.C. § 211, the Commission can require these documents to be filed when it deems necessary.

13. The arguments that the Commission has not adequately weighed the public benefits and detriments of tariff filings are incorrect. The *Further Notice* discusses extensively the harm to both non-dominant carriers and consumers resulting from continued tariff filing by forborne carriers.[35] Required tariff filings can produce the following effects: "(1) taking away carriers' ability to make rapid, efficient responses to changes in demand and cost; (2) impeding and removing incentives for competitive price discounting; (3) imposing costs on carriers that attempt to make new offerings; and (4) increasing the costs of the Commission's operations."[36] The first three effects are anti-competitive and can harm consumers through higher prices and services which do not meet their needs. The continuation of tariffs for forborne carriers also presents an opportunity for collusive pricing by competing carriers. Since carriers can ascertain their competitors' existing rates and keep track of any changes in those rates by reviewing the filed tariffs, carriers may be encouraged to maintain rates at an artificially high level. Without forborne carrier tariffs on file, carriers may initiate price cutting or generally institute rates at a lower level to meet directly customer demand.

14. The fourth harmful effect noted above results in the Commission resources and costs associated with the maintenance of forborne carrier tariffs being inevitably passed on to the public that the Commission has the obligation to protect through higher fees by the users of these resources.[37] The public interest can be better served by the Commission devoting these resources to determine the most effective regulation of carriers having market power. Mere streamlined regulation of non-dominant carriers does not remove any of the harmful effects and offers

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their tariffs and several new forborne carriers have chosen not to file tariffs for their services. (*e.g.* resellers) No complaints regarding these carriers have been received.

[35] 84 FCC 2d at 453-55.

[36] These risks to the public benefit related to the filing of tariffs were summarized in the *Fifth Report and Order*, 49 Fed. Reg. at 34827, n.24.

[37] As the *Fourth Further Notice* stated, the maintenance of these documents at the Commission's offices entail certain costs such as the cost of storage space and the cost of staff time necessary to review the form of filed tariffs, to organize the materials for public inspection, to review special permission requests and to respond to questions from members of the public concerning the tariffs.

the consumers less benefit, and imposes unnecessary costs on such carriers, their subscribers, and society generally.

15. We have concluded that pricing and service offering flexibility for such carriers subject, of course, to the overriding duties of §§ 201 and 202, 47 U.S.C. §§ 201, 202, serves the public interest in two ways. First, subscribers will have the opportunity to seek services that meet their specific needs and, thus, be able to obtain the best price/quality combination available. Secondly, by promoting the availability of competitive market forces, the development of innovative service offerings will be encouraged.

16. We believe that the opportunity for abuse of the marketplace is minimal. During our three years of experience with non-dominant carriers now subject to forbearance, we found no such carrier in violation of the Act with respect to discriminatory rates. We, therefore, believe that this experience substantiates our evaluation of market abuse potential. In all instances, we retain our regulatory oversight authority to reimpose tariff filing requirements in the event that through our complaint process monitoring, we find that abuses of market power occur or that the predictions based on our experience concerning competition in the telecommunications industry prove invalid.

17. All of our decisions to extend forbearance to certain carriers have been based on the premise that consumers will benefit and that a forborne carrier's ability to charge unlawful rates profitably would be checked by market forces and our complaint process.[38] These decisions have been made by a step-by-step proceeding through which we have gained considerable experience with the careful reduction of regulatory burdens.[39] With the tariff mechanism no longer available, carriers accustomed to dealing with their customers by tariff rather than by other methods traditionally used by non-regulated businesses might perceive some increased administrative burdens, at least initially. Our foremost duty, however, is to ensure that just, reasonable and non-discriminatory rates are available to the public.

18. The use of tariffs can restrict consumers from seeking out the most advantageous service arrangements. A tariff may be restrictive because it fosters an image that all possible service arrangements are defined within its text. Customers may be reluctant to ask for arrangements outside of the tariff because they may think such specific arrangements are unavailable or technically not feasible or are not willing to wait for the required lengthy tariff update procedures to be completed.

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[38] Second Report, 91 FCC 2d at 69-70. *See also* extensive market power analysis in Fourth Report, 95 FCC 2d at 557-562.

[39] See summary of this approach in *Fourth Report*, 95 FCC 2d at 554-56 and *Fifth Report*, 49 Fed. Reg. at 34824.

The cancellation of tariffs will naturally force forborne carriers to be more competitive and they would be more apt to adapt general service offerings as their customers' needs change. As noted in ARINC's comments,[40] forborne carriers have allegedly used tariffs to deny reasonable service requests.

19. The tariff process certainly introduces delay and additional costs when carriers responding to market changes must stop and take the time to reflect their adjustments to general service offerings in tariff filings. The public, therefore, will have greater options in obtaining service in a freer open marketplace when not constrained by a formal document, and the Communications Act's Section 1 goals for a more efficient and economically priced telecommunications system will be promoted.

20. Another major concern is that the public and state commissions are being mislead by the existence of forborne carrier tariffs on file at the Commission.[41] The presence of effective tariffs on Commission premises may suggest that the Commission has, in fact, substantively evaluated them and found no objection. Since the forborne carrier tariffs on file are presumed lawful on filing and receive minimal review, it is unfair to the public to present an appearance of Commission approval. Moreover, maintenance of tariffs is likely to inhibit the development of the "informed consumer" who diligently studies industry trends and prices. We expect this type of consumer development to be fostered in this competitive environment.

21. We have also considered the commenters' suggested alternatives to the cancellation of tariffs. We find that the use of a disclaimer, although viable and probably effective for those parties that look at the tariffs at the Commission's premises, does not eliminate the erroneous impression of FCC approval to those parties not having a tariff in front of them. The alternatives proposing a shift of tariff filing and maintenance responsibilites from the Commission staff to the carriers themselves seem unduly burdensome and are directly contrary to our stated goal of decreasing regulation wherever possible. The regular availability of rate information to other forborne carriers together with the timely notification of competitors whenever a rate changes can have anticompetitive

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[40] *See* para. 9 *Supra.*

[41] Orders of state commissions have sometimes contained provisions which appear to rely on certain tariffs that were filed with the Federal Communications Commission. A case in point is a recent California Public Utilities Commission decision with regard to competitive interexchange carriers which said "If any applicant has an effective FCC approved tariff, it may file a notice adopting such FCC tariff with a copy of the FCC tariff included in the filing." Order Instituting Investigation, 84-06-113 at 103 (1984). Carriers themselves have been subjects of complaints that allege misuse of "FCC approval statements." *See* In the Matter of Hart Industries, Inc. Revisions to Tariff F.C.C. No. 1, Transmittal No. 3, Mimeo No. 3323, released September 11, 1981.

effects including the facilitation of price fixing and collusion among forborne carriers. In addition, our experience with requests for tariff information in the Public Reference Room on the fifth floor of the main building of the Commission shows that the overwhelming majority of inquiries are made by carriers or their representatives and not by the general public that the commenters argue are in need of a central information point. By our decision today, we do not minimize the need of the general public to obtain information as to rates and terms and conditions of service of forborne carriers. We believe, however, that these carriers, in the interest of preserving their competitive positions will make their rates and other information, formerly contained in tariffs, available to the public.[42]

22. Many commenters pointed out that an extended period of time would be needed to replace existing tariffs with separate contracts. For this reason, we have determined that a six month phase-in period will be allowed for this process. Procedural details as to how this process will take place are given below. It is out belief that this six month period will be adequate time for an efficient transistion. We do not, however, envision that a carrier will have to negotiate entirely new rates, terms and conditions with each customer. Tariffs are not the only way to operate in a competitive business environment. Major companies employ several different methods of providing service to their customers that forborne carriers could use.[43] The argument that rates, terms and conditions can and will be changed as a result of tariff cancellation is invalid. Under the existing tariff process, a forborne carrier may at any time file a new tariff with changed rates, terms and/or conditions. These changes whether or not made through the tariff process are still required to be just and reasonable under the Act.

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[42] The District Court of the District of Columbia analyzed this issue in National Small Shipments Traffic Conference, Inc. v. Civil Aeronautics Board 618 F.2d 819, 824 (D.C. Cir. 1980), and determined that "the economic self-interest of the carriers would ensure that tariff information is made available to potential customers." The Court further noted the C.A.B.'s finding that "a carrier's ability to successfully market its services to the public depends in part on its success in informing potential customers what its charges will be and what services it offers."

[43] Alternatives that carriers may wish to follow include issuing a short standard agreement to all customers. Tariffs that contain terms and rates for extended periods of time, such as between domestic satellite carriers and cable television companies, can be incorporated into contracts without changes. With respect to these tariffs containing provisions involving long-term offerings, the standards for determining the reasonableness of applicable rates would still apply. *See* RCA American Communications, Inc., 86 FCC 2d 1197, 1201-02 (1981), *aff'd.*, 94 FCC 2d 1338 (1983), *aff'd. mem.* RCA American Communications, Inc. v. Federal Communications Commission [judgment D.C. Cir. No. 81-1558 (March 8, 1984)]. The complaint process can be used to determine whether such rate changes are unreasonable.

23. In order to comply with this Report and Order, forborne carriers must file supplements to cancel their tariffs on file with the Commission within six months of the effective date of this Order. The supplements shall be effective upon five days' notice and shall reference this Order as authority for cancellation. Those carriers that have "mixed" tariffs[44] on file at the Commission shall comply with this order by doing either of the following: (1) Cancel the entire tariff and refile a new tariff for only those services subject to dominant or streamlined regulation; or (2) Issue revised pages cancelling the material in the tariff which pertains to services or service points subject to forbearance. All cancelled pages and tariffs will remain in the Tariff Public Reference Room on the fifth floor of the main building of the Commission for a period of two years. Appendix A contains a list of carriers which currently have tariffs on file and are affected by this Order.[45]

24. During the six month transition period, new tariffs of forborne carriers that do not currently have any tariffs on file will not be accepted by the Commission. Those forborne carriers that have existing services under tariff on file at the Commission must provide those services consistent with the tariff until they choose to cancel those tariffs. In the alternate, we expect that carriers will update tariffs still on file during the six month transition period. This requirment will eliminate any confusion to the consumer who will rely on the stated rates in the tariff until it is cancelled.

25. Carriers affected by this Order are required to maintain at their premises price and service information that they can submit to the Commission if requested.[46] This information can be in any form that the carrier chooses. The carrier must also maintain copies of service contracts and documentation of agreements and arrangements with all customers. When the Commission, as a result of a complaint filed or upon its own motion, requests specific information from a carrier, that carrier must be able to produce it fully within a reaonable amount of time.[47] We believe that this requirement is not unduly burdensome on the affected carriers

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[44] A "mixed" tariff is one which contains rates, terms and/or conditions for services or service points that are subject to differing degrees of regulation (*i.e.*, tariffs containing both international and domestic off-shore service points).

[45] After reviewing the more than 900 tariffs currently on file at the Commission, we believe that the attached list is substantially complete. The fact that a carrier's name does not appear on this list does not, however, release that carrier from the obligation of complying with this Order.

[46] This requirement is not to be confused with posting requirements contained in Part 61 of the Commission's Rules, 47 C.F.R. § 61.72. Forborne carriers may keep this information at whatever company location they desire.

[47] The customary amount of time allowed for response to Commission inquiries concerning complaints is thirty days. This time may be shortened or extended by the Commission depending on the circumstances.

because the documents expected to be retained are those records used by carriers in the normal course of administering their business. Maintenance of these documents will provide the Commission with adequate data in order to meet its statutory duty of ensuring that carriers' rates are just and reasonable. Further, this information retention requirement will enable the carriers to meet their public interest obligations.

IV. Conclusion and Ordering Clause

26. We believe that the actions ordered today will benefit the public by promoting competition and reducing regulatory burdens since other statutory and regulatory tools are at our disposal and are adequate to ensure that just and reasonable rates will be maintained. Indeed, we believe the detariffing of forborne carriers will lead to lower rates and higher quality services for the consumers. We stress that we will monitor the effects of the cancellation of forborne carrier tariff filings on the marketplace and that we will take action as necessary to continue the development of a competitive environment for telecommunications services. If we determine that the action taken today disrupts the marketplace or is in any other way detrimental to the public interest, we stand ready to reimpose the tariff filing requirements on forborne carriers.

27. IT IS THEREFORE ORDERED, pursuant to Sections 4(i) and (j) and 201-205, of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and (j), and 201-205, and Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, that the policies set forth herein are adopted and that they will become effective February 11, 1985.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX A

List of Affected Carriers

Specialized Common Carriers

Access Code, Inc.

Allnet Communications Services, Inc.

Altcom

Alternative Communications Corp.

Americall LDC, Inc.

American Interstate Communications Inc.

American Motor Inns

American Private Line Services, Inc.

AMERTEL Company

AMTEL, Inc.

Business Telephone System, Inc.

Call-ex International

Central Delivery Service of Washington, Inc.

Centranet Communications Corp.

Chernow Communications Inc.

Communications Center, Inc.

Communications Equipment Corp.

CommuniGroup, Inc.

Compath Network Serv.

Comprehensive Communication Systems, Inc.

Specialized Common Carriers cont.

Compusultants, Inc.

Comtel Industries, Inc.

Continental Telecommunications Systems, Inc.

Crowley, Charles Edward

Dag, Inc.

Datel Communications Systems, Inc.

Delta Communications Inc.

DHL Communications, Inc.

Discount Long Distance, Inc.

Eastern Microwave, Inc.

Electronic Office Centers of America

Energy Communications Corp.

Family Telephone Network

Florida Telcom Long Distance Company

F.M. Cable, Inc.

GCI Network Inc.

Graphnet Inc.

Griswold's

GTE Sprint Communications Co.

GTE Business Communication Systems, Inc.

GTE Telenet Communications Corp.

Hart Industries, Inc.

Heins Systems, Inc.

Holywell Telecommunications Company

Ho-Tel, Inc.

Hyatt Corporation

Industry Hills Visitor Accomodation Partnership

Interstate Communications, Inc.

JSL/Toll Management

Kiawah Island Communications Company, Inc.

Lexitel Corporation

Liberty Bell Communications, Inc.

LINTEL Systems, Inc.

Long Distance Savers, Inc.

Long Distance/USA, Inc.

MCI Telecommunications Corp.

Microtel, Inc.

Mid-Continent Communications Corp.

Morris Long Distance Telephone Co.

National Communications Corp.

National IMS Corp.

National Telecommunications Network, Inc.

Network I, Inc.

North American Telephone Co., Inc.

Northland Telephone Systems Ltd.

NTS Communications Ltd.

Number Please Ltd.

(The) Offshore Telephone Co.

Olympia Communications Co., Inc.

Pacific Network Communications

P.A.T.H. Finders

Pathfinders Communications

Pease & Associates Network Serv. Div.

Penn Telecom, Inc.

QWest Microwave, Inc.

RCI Corporation

Rotelcom, Inc.

Satelco, Inc.

Sharecom, Inc.

Shentel Service Company

Southland Systems, Inc.

Tel-a-Marketing Communications, Inc.

Telecall, Inc.

Telecom Equipment Corp.

Telecom Systems, Inc.

Telecommunications Facilities Management, Inc.

Telecommunications Service Corp.

Teleconnect Company, Inc.

Telephone Management Systems, Inc.

Telephone Warehouse Inc.

Tele-Sav Communications

Telshare, Inc.

Tel Systems Management Corp.

Teltec Saving Communications Co.

TODCO Communications Co.

Transamerica Systems, Inc.

Specialized Common Carriers cont.

Transnational Network, Inc.

Transportation Microwave Corp.

United Network Service, Inc.

United Services Administration

U.S. Telephone, Inc.

U.S. Transmission Systems, Inc.

Vector Communications, Inc.

Watsphone Company

Westel, Company

Western Tele-Communications Inc.

Wylon

YOGAO, Inc.

Digital Transmission Network (DEMS)

Local Area Telecommunications, Inc.

Earth Station and Transportable Service

American Television & Communications Corp.

Atlantic Sat. Comm. Inc.

Channels of Blessings

Colony Satellite Services, Inc.

Communications Carrier, Inc.

CPI Satellite Tele-Communications, Inc.

Eastern Microwave, Inc.

First Television Corporation

Great Trails Broadcasting, Corporation

Greater Star Link Corp.

Golden West Broadcasters

Kansas Uplink Serv. Inc.

Koplar Commun., Inc.

Midwest Cable and Satellite Inc.

NEP Communications, Inc.

New England Microwave, Inc.

Pappas Satellite Serv.

San Joaquin TV Service, Inc.

Satellite Networks, Inc.

Satellite Transmission and Receiving Co.

Sjoberg's, Inc.

South Florida Cable Television Corp.

Sunbeam T.V. Corp.

Taft Broadcasting Co.

Tele-Link Communications, Inc.

Teleprompter Corp.

Transportable Earth Stations, Inc.

U.S. Satellite Corp., Inc.

Western Satellite Corp.

Western Tele-Communications Inc.

Wold Communications, Inc.

Miscellaneous Microwave

Alabama Microwave, Inc.

ALIEF Communications

ALLNET Communications Services, Inc.

American Microwave & Communications, Inc.

American Mobilphone Co.

American Television & Communications Corp.

American Television Relay, Inc.

Andrews Tower Rental, Inc.

Arizona Micro-Wave System Co.

ATS Mobile Telephone, Inc.

Black Hills Video Corp.

Brentwood Company

Brentwood Company/Microwave System Company

Business Telecommunications Corporation

Capital Cities Cable, Inc.

Centel Videopath, Inc.

Columbia Communications Co.

Contact New Mexico, Inc.

Continental Telephone Company of Texas

Eastern Microwave, Inc.

Eastern Shore Microwave Relay Company

East Texas Transmission Company

Others

FTC Communications, Inc.

ITT World Communications, Inc.

RCA Global Communications, Inc.

TRT Telecommunications Corporation

Western Union International, Inc.

Others cont.

Western Union Telegraph Co.
First Television Corp.
Florida Micro-Communications
Garden State Micro Relay, Inc.
General Communications, Inc.
Grayson Enterprises, Inc.
H & B Microwave Corporation
Hi-Desert Microwave, Inc.
Kelly Co.
Maine Microwave, Inc.
Mercury Communications
Microcom, Inc.
Micro-Relay, Inc.
Micro-Video, Inc.
Microwave Express, Inc.
Microwave Mobile Systems
Microwave Service Company
Microwave Service Company of Florida, Inc.
Microwave Transmissions Service, Inc.
Mid-Kansas, Inc.
Midwestern Relay Co.
Mississippi Valley Microwave
National Telephone Company
New England Microwave Corp.
New England Microwave, Inc.
Newhouse Alabama Microwave, Inc.
North Canadian Microwave Corporation
Northco Microwave, Inc.
Pacific Telatronics, Inc.
Penn Service Microwave Company
Pilot Butte Transmission Company, Inc.
St. Lawrence Microwave Company
Southeast Kansas Microwave, Inc.
Southwest Microwave, Inc.
Southwest Texas Transmission Company
Telehop Microwave Telecommunications
Teleplex Microwave Systems, Inc.
Teleprompter Transmission of Kansas, Inc.
Teleprompter Transmission of Oregon, Inc.
Television Microwave, Inc.
Tex-Mex Communications Co.
Tower Communications Systems Corporation
Trans-Muskingum, Inc.
Transtel Corporation
TVE Transmission, Inc.
United Microwave Corp.
United Video, Inc.
United Wehco, Inc.
Video Service Company
Warner Cable Corporation
Western Tele-Communications, Inc.
Western TV Relay, Inc.
West Texas Microwave Company, Inc.
Wyoming Microwave Corporation
Yankee Microwave, A Division of Karlen Communications, Inc.

Domestic Satellite Service

Allstate Communications Company
American Satellite
ASN, Inc.
Atlantic Transport Company
Bonneville Satellite Corporation
Compact Video Services, Inc.
Eastern Microwave Inc.
Equatorial Communications
General Communications Inc.
GTE Satellite Corp.
GTE Spacenet Corp.
Hi-Net Communications, Inc.
Hughes Communications Carriers Services, Inc.
ISACOMM, Inc.
IT & E Overseas
Meredith Corporation
Metropolitan Communications Network Company
Midwestern Relay Company
Netcom International

Domestic Satellite Service cont.

RCA American Communications

RCA/Joint

Satellite Business Systems

Satellite Communications Network, Inc.

Satellite Data Broadcast Networks, Inc. (SATNET)

Southern Satellite Systems, Inc.

United Video, Inc.

USAA Satellite Communications Company

VideoStar Connections, Inc.

Western Telecommunications, Inc.

Western Union Telegraph Company

SEPARATE STATEMENT
OF
COMMISSIONER HENRY M. RIVERA

RE: Sixth Report and Order In Re Competitive Carrier Policies

For the reasons outlined in the *Sixth Report and Order*, our decision to mandate detariffing of certain carriers is wise policy. I agree that permitting these carriers to continue filing "tariffs" undermines the objectives of our forbearance decisions by facilitating anticompetitive behavior.

While I recognize that the instant decision is not legally risk free, I am convinced it is legally defensible. Section 203(b)(2) bestows upon the Commission the discretion to modify the statutory tariff duty. We have found that modification, *ie.*, dispensing with tariffs for forborne carriers, will enhance the pro-competitive environment. Modification is, therefore, in the public interest.

That we have the discretion to dispense with tariff filings, however, does not absolve the Commission from continuing to assure that the rates and practices of all common carriers within our jurisdiction are just and reasonable in accordance with Sections 201 and 202. This latter duty is not a matter of agency discretion. Good faith administration of the complaint process will enable the Commission to oversee the practices of forborne carriers toward this end and is, therefore, the legal *Sine qua non* of this deregulatory experiment. It is essential that the Commission move promptly to adopt procedures and standards that will assure the effectiveness of the complaint process and we will soon have that opportunity. *See Sixth Report and Order* note 26. When it comes time to adopt such procedures and standards, I will strive to be certain that the process is meaningful for interested parties.[1]

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[1] *Cf. Second Report and Order* in BC docket 79-219 (Deregulation of Radio), 49 Fed. Reg. 19019 (May 4, 1984).

Accounting/Cost Allocation Practices
Comsat
Satellite Communications
Structural Separation

Memorandum Opinion and Order adopted denying petitions for reconsideration for the Second Comsat Structure Order, 97 FCC 2d 145. Order retains current policy of permitting Comsat to engage in competitive (nonjurisdictional) activities through structurally separated subsidiaries. Order also grants in part the petition for reconsideration filed by Comsat. Order authorizes Comsat to employ a "gross operating expenses" formula.

—*COMSAT*
CC Docket No. 80-634

FCC 84-565

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

In the Matter of	
Changes in the Corporate Structure and Operations of the Communications Satellite Corporation	CC Docket No. 80-634

MEMORANDUM OPINION AND ORDER

Adopted: November 21, 1984 Released: December 11, 1984

BY THE COMMISSION:

I. Introduction And Background

1. We have before us three petitions for reconsideration of our Second Memorandum Opinion and Order in the above-captioned matter.[1] These petitions were filed by the Communications Satellite Corporation (Comsat), United Satellite Action (USA) and M/A-COM, Inc. (M/A-COM). Comsat's petition was opposed by MCI International, Inc. (MCII); Comsat opposed the petitions filed by M/A-COM and USA; and M/A-COM filed a response to Comsat's opposition.

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[1] Changes in the Corporate Structure and Operations of the Communications Satellite Corporation, 97 FCC 2d 145 (1984) (Second Structure Order or Order).

2. In the *Second Structure Order*, we affirmed our prior determination that, as a matter of law and policy, Comsat is permitted to engage in nonjurisdictional (competitive) activities through separate subsidiaries, partnerships and joint ventures.[2] We also established new formulas for allocating shared capital costs and expenses between Comsat's jurisdictional (INTELSAT/INMARSAT) and nonjurisdictional activities. Recognizing Comsat's increasing involvement in nonjurisdictional activities, we sought to ensure that the jurisdictional ratepayer would not be burdened with the capital costs, expenses and financial risks associated with ventures outside Comsat's statutory mission.[3] The new cost allocation formulas we prescribed for shared expenses and capital costs have resulted in a reduction in certain jurisdictional accounts, a decrease in Comsat's revenue requirement and a lowering of Comsat's rates.

3. In modifying Comsat's cost allocation formulas for shared expenses and capital costs, we focused on four types of accounts: (a) shared general and administrative (G&A) expenses; (b) shared G&A capital costs; (c) shared research and development (R&D) expenses; and (d) shared R&D capital costs. We required Comsat to replace its property and revenues-based allocation formulas with "cash expenses" formulas.[4] We did so upon a finding that the cost allocation formulas Comsat had been using resulted in allocations of shared expenses and capital costs that were unfairly weighted toward Comsat's capitally mature and revenue producing ventures. These capitally mature and revenue producing lines of business are its jurisdictional activities.

4. We found that Comsat's more recently initiated ventures, which are generally nonjurisdictional in scope, do not have fully matured capital assets and have not produced substantial revenues. Yet these ventures have incurred large expenses and have consumed a great deal of management's time and effort. Consequently, under Comsat's prior practices disproportionately small percentages of shared expenses and capital costs were allocated to nonjurisdictional accounts and the percentages of shared expenses and capital costs allocated to jurisdictional accounts were inordinately large. Thus, we found that jurisdictional ratepayers were subsidizing Comsat's nonjurisdictional activities.

5. We concluded that the use of cash expenses formulas to allocate shared expenses and capital costs would better reflect the fact that

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[2] Communications Satellite Corporation, 90 FCC 2d 1159 (1982) (First Structure Order).

[3] *See* Sections 102 and 305 of the Communications Satellite Act of 1962, 47 U.S.C. §§701, 735 (1976).

[4] "Cash expenses" are current gross operating expenses less depreciation (the yearly cost of property). *See* note 10, *infra*. By use of this formula, the jurisdictional activities' share of these expenses would be determined by using the ratio of cash expenses directly charged/assigned to jurisdictional activities to total cash expenses directly charged/assigned throughout the corporation.

Comsat's immature businesses receive heavy R&D and G&A support. We required Comsat to replace any cost allocation formulas based on arbitrary fixed percentages with ones which more accurately track the actual use of the corporation's underlying capital assets.[5] Moreover, we directed Comsat to file revised tariffs for all of its INTELSAT service offerings based upon the reduced rate base and expenses and lower revenue requirement that we anticipated would result from the implementation of the *Second Structure Order*. We also required that these new rates be targeted to Comsat's authorized rate of return of 11.48-12.48 percent.[6]

6. Comsat filed a petition seeking reconsideration of certain aspects of the *Second Structure Order*, a request which is opposed by MCI International, Inc. (MCII). Also before us are a petition for reconsideration filed by USA and a petition for reconsideration and additional relief by M/A-COM, both of which are opposed by Comsat. For the reasons discussed below, we shall deny the requests of USA and M/A-COM and grant Comsat's petition in part.

II. Summary of the Pleadings

A. Comsat

7. Comsat contends that the cost allocation formulas we prescribed in the *Second Structure Order* for shared G&A and R&D expenses and capital costs go too far. Comsat states that the prescribed formulas overly deemphasize capital costs, threaten the existence of Comsat Laboratories and, by extension, the leadership position of the United States in satellite technology and the INTELSAT organization. Comsat claims that the effect of the *Order* will be to reduce from 70 percent to 20 percent the expenses associated with the corporate-initiated R&D performed at the Labs which are ratepayer-funded and reduce from 75 percent to less than

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[5] For example, rather than continue to permit Comsat to allocate approximately 75 percent of its capital costs for Comsat Laboratories' plant and equipment to its jurisdictional rate base, we directed Comsat to place certain of these expenses in nonjurisdictional accounts and required the corporation to employ cash expenses formulas to allocate to its jurisdictional and nonjurisdictional accounts R&D capital costs and non-readily identifiable ("residual pool") R&D expenses. 97 FCC 2d at 170-175.

[6] This rate of return range was established in the "Comsat Rate Case" settlement agreement approved by the Commission and Comsat's Board of Directors in 1978. Communications Satellite Corporation, 68 FCC 2d 941 at n. 1 (adopted May 9, 1978; released May 23, 1978). (Settlement Agreement Order). The new rates, filed under Transmittal No. 507 and reflecting an across-the-board rate reduction of 5.76%, went into effect on July 30, 1984. CC Docket No. 80-634, Transmittal No. 507, Transmittal No. 510, Mimeo No. 5797, released August 2, 1984 (Second IBSS Order). Comsat has pending an application for review of the latter and a request for emergency relief which we incorporate here by reference and deny for the reasons discussed at paras. 37-41, *infra*.

13 percent the capital costs of the Labs which are ratepayer-funded.[7] Such results, Comsat asserts, are attributable to three aspects of the allocation formulas prescribed in the *Order*: (a) the cash expenses formulas for allocating shared (residual pool) G&A and R&D expenses and capital costs between Comsat's jurisdictional and nonjurisdictional accounts do not recognize the capital costs incurred by the corporation; (b) Comsat must include in the denominator of these new formulas its proportionate share of the cash expenses of the partnerships and joint ventures in which it holds an interest;[8] and (c) Comsat must classify INTELSAT contracts as nonjurisdictional for cost allocation purposes, *i.e.*, exclude from its allocation formulas the costs and revenues associated with Comsat's performance of INTELSAT contracts.

8. Comsat requests that the Commission modify the *Second Structure Order* to include capital costs in the allocation formulas, to exclude from the cost allocation formulas Comsat's share of the cash expenses of its partnerships and joint ventures, and to permit Comsat to continue to treat INTELSAT contracts as jurisdictional for cost allocation purposes. Comsat states that with these changes, jurisdictional activities would contribute more than 20 but less than 50 percent of the expenses of the basic R&D program, and contribute approximately 40 percent of the capital costs of the Labs.

9. *Cost Allocation Formulas*. As to the cash expenses formulas we prescribed for the allocation of shared G&A and R&D expenses and capital costs, Comsat maintains that the cash expenses formulas fail to take the corporation's capital costs into account as a distinct component of the formulas. As such, the formulas ignore the fact that the corporation is highly capital intensive. Comsat states that formulas should be employed which correctly allocate all of Comsat's shared expenses and capital costs between jurisdictional and nonjurisdictional accounts so as to realistically reflect the relative maturity of its various ventures. Comsat argues that formulas which rely on cash expenses as the exclusive allocative factor will produce a distorted picture of the maturity of its ventures and the overall corporation's financial activity. Comsat asserts that nonrecognition of capital costs is inconsistent with standard Commission practice

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[7] Comsat Petition at 2. Comsat defines "corporate-initiated R&D" as "the basic R&D program developed by the Labs itself and not in response to specific requests from affiliated or outside entities." The figures 70 percent and 75 percent for rate-payer funded corporate-initiated R&D and jurisdictional account treatment for the capital costs of the Labs, respectively, are set forth in the "Supplemental Report of the Communications Satellite Corporation on Allocation of Costs of Shared Services and Comsat Labs," pp. 29, 31 (May 9, 1983) (Supplemental Report).

[8] 97 FCC 2d at 176. Although this is a general requirement, the Order specifically directed Comsat to include one-third of the cash expenses of Satellite Business Systems (SBS) and one-half those of Intelmet.

regarding the establishment of cost allocation formulas for regulated entities.

10. Comsat states that capital costs were included as an element in all of the alternatives to cash expenses considered during the course of this proceeding - the "three-factor" formula with its modifications,[9] the "gross operating expenses" formula[10] and the "gross expenditures" formula.[11] In its Supplemental Report filed in an earlier phase of this docket, Comsat proposed to substitute the "gross expenditures" formula for either the "three-factor" or "gross operating expenses" formulas. In its petition for reconsideration, Comsat no longer expresses a preference for any of these particular alternatives, although it proposes that the Commission adopt any alternative to a cash expenses allocation formula which would reflect capital.[12]

11. *Partnerships and joint ventures.* Comsat also objects to our requirement that it include in the denominator of the cost allocation formulas for residual pool G&A and R&D expenses its pro rata share of the total cash expenses of its partnerships and joint ventures. Comsat is now required to treat the cash expenses of its wholly-owned subsidiaries in this manner. Comsat asserts that unlike the latter, from which it is in a position to recoup costs incurred for activities performed on their behalf, the partnerships and joint ventures in which it is involved are separate, independent entities which may or may not choose to contract for services, financial and otherwise, rendered by Comsat in its partnership role. Comsat states that if we decline to rescind this requirement its nonjurisdictional ventures will be forced to bear an additional 15 percent of Comsat's corporate-initiated R&D program based upon the cash expenses of SBS alone.[13]

12. Comsat implies that separate entities such as SBS do not derive benefits from the activities reflected in the residual pool.[14] Comsat argues that our prescribed treatment of its share of the cash expenses of its partnerships and joint ventures is unjustified because: (a) the corporation has established a task accounting system which identifies and assigns to its shareholders all costs attributable to the activities it undertakes on

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[9] The "three-factor" formula allocates costs to each of Comsat's corporate elements based on: (1) total salaries; (2) operating revenues; and (3) capital assets attributable to that element as compared to the corporation as a whole.

[10] The "gross operating expenses" formula includes all cash operating expenses plus the amount of depreciation expended in a year for operations. 97 FCC 2d at 156, n. 22.

[11] The "gross expenditures" are current operating expenses less depreciation plus total capital costs expended in a year. *Id.* at 155, n. 21.

[12] Comsat also requests that we clarify our prior order on the manner in which it is to allocate "special G&A expenses." This issue is discussed below at paragraph 59.

[13] Comsat Petition at 12.

[14] *Id.*

behalf of SBS;[15] (b) it includes its SBS investment in its cost/benefit allocations for Common Stock Costs and Shareholder Meeting Expenses; and (c) it has proposed to allocate directly to COMSAT General Business Communications Inc. (BCI) a percentage of the executive costs of the entire corporation before the remainder of these costs are allocated to jurisdictional and nonjurisdictional accounts through the residual pool.[16] For these reasons, Comsat believes our requirement for treatment of its partnerships and joint ventures is unnecessary and impractical and will cause financial harm to its nonjurisdictional lines of business.

13. *INTELSAT contracts.* The third area of concern to Comsat is the requirement that it remove INTELSAT contracts from its jurisdictional accounts. Comsat asserts that all of its relationships with INTELSAT are jurisdictional and that benefits accrue to the ratepayer from work performed pursuant to R&D contracts awarded to Comsat by INTELSAT. Comsat also claims that the R&D performed for INTELSAT enhances U.S. leadership in satellite technology and enables the Labs to maintain a viable basic R&D program. Moreover, Comsat states that to the extent that the revenues received from INTELSAT for particular R&D projects are not sufficient to cover the fully allocated costs of the projects, it must be borne in mind that the research facilities of non-U.S. Signatories are generally government subsidized and thus are not subject to the pricing restraints imposed upon Comsat. Although Comsat wishes to be permitted to classify all INTELSAT contracts as jurisdictional, it requests that in the event the Commission does not change its current posture, we should allow Comsat a transition period, the duration of which Comsat does not specify, to enable it to increase the prices it charges INTELSAT for contract R&D work and to seek to convince INTELSAT that it would be in the organization's interests to continue to contract with the Labs.

14. Comsat argues that the cumulative effect of the *Second Structure Order* is an unfair allocation of costs whereby its competitive ventures would be forced to subsidize its jurisdictional activities. If the aspects of the *Order* with which Comsat is concerned are not modified, Comsat claims, only 20 percent of the Labs' basic R&D program would be allocated to jurisdictional accounts. Yet ratepayers, in Comsat's view, benefit not only from the products and inventions produced by the Labs which enhance the development of international satellite telecommunications, they also benefit from the efforts of the Labs' personnel to monitor

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[15] As we discuss below, Comsat has reached an agreement in principle with its SBS partners, IBM, Inc. and Aetna Life Insurance Corporate, that they will assume Comsat's entire ownership share of the business. This agreement, which is subject to Commission approval, has not yet been finalized.

[16] BCI is the subsidiary which serves as the equity partner in SBS. The percentage allocated would be based on the ratio of BCI's investment in SBS to the total assets of the operating elements of the entire corporation. Comsat Petition at 11.

independently INTELSAT's R&D program to protect against cost inefficiencies and technological deficiencies and to ensure even-handed treatment of all Signatories by INTELSAT. Comsat estimates that under the *Second Structure Order* the basic R&D program of the Labs ultimately either would be restructured to focus on the needs of the entities supporting 80 percent of the basic R&D program—Comsat's competitive lines of business—or eliminated altogether. Either result, Comsat contends, would destroy the Labs as a national resource in the field of international telecommunications and space technology, to the detriment of both the leadership role of the United States in INTELSAT and the U.S. ratepayer. Comsat finds this contrary to the public interest.

15. *Rates.* As a final matter, Comsat requests that we rescind the requirement that it file tariff revisions targeted to its authorized rate of return of 11.48-12.48 percent. Comsat avers that the question of rate of return is not at issue in this proceeding. Further, Comsat asserts that the Commission is without authority to require Comsat to modify its current tariffs absent full opportunity for hearing on, among other things, the changes in the economy and in Comsat as a corporation since the *Comsat Rate Case* settlement agreement was approved by the Commission and Comsat's Board of Directors in 1978.[17] In Comsat's view, the targeting of tariffs to the authorized rate of return which was established six years ago, without considering the relevant factors that have arisen in the interim, is contrary to established law.[18]

B. MCII Opposition

16. MCII opposes Comsat's request for reconsideration and states that the cost allocation formulas in the *Second Structure Order* will help ensure that the jurisdictional ratepayer is not the source of cross-subsidies for Comsat's competitive services and that the new cost allocations formulas mandated in the *Order* will lead to reductions in Comsat's rates. Yet, MCII doubts whether, even with structural separation and these cost allocation mechanisms is place, the Commission has the resources effectively to monitor Comsat's activities. Therefore, MCII requests that we reopen the terminated *Direct Access* proceeding and grant the U.S. international carriers cost-based access to INTELSAT.[19]

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[17] *See* Settlement Agreement Order, note 6, *Supra.*

[18] Comsat Petition at 24, n. 32.

[19] Regulatory Policies Concerning Direct Access to INTELSAT Space Segment for the International Service Carriers, 97 FCC 2d 296 (1984) (Direct Access Report and Order), *petition for review filed sub nom.* Western Union International Inc. v. FCC, No. 84-1202 (D.C. Cir. May 24, 1984).

C. United Satellite Action (USA)

17. USA requests that we revisit that aspect of the *Second Structure Order* which reaffirms our prior decision to permit Comsat to engage in nonjurisdictional activities through separate subsidiaries.[20] USA does not believe that this structural arrangement is sufficient to prevent Comsat from engaging in cross-subsidization and other forms of anticompetitive conduct. Asserting that the legislative history of the Communications Satellite Act of 1962 shows no evidence of congressional intent to permit Comsat to engage in activities not expressly mandated in the statute, USA argues that the Commission should require Comsat to divest itself of all competitive lines of business.

D. M/A-COM

18. In its petition for reconsideration and additional relief, M/A-COM echoes the position of USA. Further, M/A-COM requests that if the Commission declines to order divestiture, the agency should adopt additional safeguards and modifications to the *Second Structure Order* and to the Commission's policy on public access to information emanating from INTELSAT and INMARSAT.[21]

19. M/A-COM asserts that the Commission's rationale for permitting Comsat to engage in nonjurisdictional activities through separate subsidiaries was that certain economies of scale would result from Comsat's integrated structure. M/A-COM doubts that any such economies of scale have ever existed. If they have, M/A-COM argues, they have been overshadowed by losses of over $100 million incurred by Comsat's nonjurisdictional ventures since 1981.[22] M/A-COM challenges the Commission to describe and quantify Comsat's economies of scale and weigh them against the benefits of divestiture.

20. M/A-COM also protests that Comsat's jurisdictional and nonjurisdictional operations and personnel are not sufficiently separated. It asserts, for example, that without notice to the Commission, as required in our first *Comsat Structure Order*, Comsat established a new organization - a developmental laboratory within Comsat Labs-which is dedicated

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[20] USA is an organization whose membership includes satellite communications service providers, equipment manufacturers, and engineering and technical consultants, and businesses which utilize the satellite telecommunications network. Its stated purpose is to advance international trade, domestic competition and efficiently-priced service.

[21] The INTELSAT/INMARSAT information flow policy was set forth in the First Structure Order, 90 FCC 2d at 1186-1194, and implemented in letters from the Chief, Common Carrier Bureau, to Lawrence M. DeVore, Vice President and General Counsel, Comsat World Systems Division, dated June 23, 1983 and March 30, 1984.

[22] Though it does not so state expressly, M/A-COM implies that the ratepayer has borne some or all of those losses through Comsat's alleged cross-subsidization practices. M/A-COM Petition at 7, n.8.

to competitive product development for the Comsat Technical Products Group. M/A-COM opposes as well our decisions to permit Comsat's Headquarters Division legal staff perform work for COMSAT General and to permit the Corporate Development Staff, which develops new products for Comsat's nonjurisdictional entities, to remain within the Headquarters Division. M/A-COM therefore requests that we require Comsat to justify each combined staff element in a formal filing, with opportunity for public comment.

21. As to the dissemination of INTELSAT/INMARSAT-related documents and information, M/A-COM asserts that we have not addressed several areas of concern. First, M/A-COM states that since the Corporate Development Staff is located within the Headquarters Division this group presumably has access to INTELSAT documentation and information which is withheld from the public under the "threshold confidentiality" aspect of our information flow procedures. M/A-COM also presumes that the members of legal staff who perform work on behalf of Comsat's nonjurisdictional lines of business have access to information otherwise exempt from disclosure under our information flow procedures. M/A-COM thus urges us to remove the Corporate Development Staff from the jurisdictional entity and also to structurally separate the legal staff. Moreover, M/A-COM requests that we specifically prohibit all Comsat employees, including corporate executives, from using non-public INTELSAT and INMARSAT data and information in reaching decisions for Comsat's nonjurisdictional subsidiaries.

22. On the same general issue of access to information, M/A-COM requests that we prohibit Comsat from transferring employees between jurisdictional and nonjurisdictional elements of the corporation. M/A-COM maintains our decision in the *Second Structure Order* not to do so undercuts the control mechanisms and licensing procedures established in the March 30, 1984 information flow letter to Comsat.[23] M/A-COM requests that we require Comsat to identify the number, responsibilities and projects of all employees who have been transferred from Comsat Labs to nonjurisdictional affiliates since January 1, 1982 so that we may ascertain whether any abuses involving employee transfers have occurred.

23. M/A-COM seeks additional relief in four other areas. First, M/A-COM alleges that Comsat guarantees the consulting contracts of its

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[23] Under these procedures, Comsat must make publicly available at the same time and under the same terms and conditions any INTELSAT/INMARSAT information or technical data and information generated from INTELSAT/INMARSAT-funded work which Comsat or Comsat Labs makes available to its corporate subsidiaries.

subsidiaries.[24] M/A-COM requests that we examine the extent of this practice, determine whether it has resulted in any costs to the jurisdictional ratepayer, and order Comsat to cease this practice because it appears to depart from the underlying strictures of the *Second Structure Order*. Second, M/A-COM requests that we investigate whether and to what extent Comsat's ability to borrow money, and the associated costs thereof, are affected by its nonjurisdictional activities. Third, M/A-COM wishes us to act upon what it asserts is Comsat's anticompetitive practice of jointly advertising and promoting its jurisdictional and nonjurisdictional services.[25] Finally, on the grounds that throughout the course of this proceeding the ratepayer has been burdened by Comsat's improperly allocated common costs and faulty cost-accounting methodologies, M/A-COM urges us to apply the *Second Structure Order* cost allocation formulas and procedures retroactively. Further, M/A-COM asks us to require Comsat to submit retroactive cost studies in order to determine if the new cost allocation formulas and procedures would have affected Comsat's past rates.

E. Comsat Opposition

24. In response to USA and M/A-COM, Comsat asserts that neither of these parties has raised new issues which would cause us to revisit our determination that Comsat may engage in nonjurisdictional activities through separate corporate entities. In arguing that divestiture is unwarranted, Comsat maintains that USA's pleading consists of unsupported assertions as to the consequences of permitting the corporation to continue to engage in nonjurisdictional lines of business and that M/A-COM's legal analysis of the Satellite Act and Comsat's Articles of Incorporation is flawed by a selective, self-serving interpretation of relevant case law and other authorities. Comsat states that although the Commission did not attempt to quantify each of the specific benefits that would accrue to the ratepayer, the agency made clear in the *Comsat Study* submitted to Congress in 1980 the public interests benefits, including economies of scale, resulting from Comsat's participation in activities not directly related to its involvement in INTELSAT and INMARSAT.[26] Comsat also asserts that M/A-COM's has wrongly attempted to tie losses sustained by certain of Comsat's nonjurisdictional activities to Comsat's jurisdictional rates. Comsat states that such losses have no adverse effect upon its rates because Comsat does not include

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[24] As the basis of its allegation M/A-COM refers to a COMSAT General consulting contract with ARABSAT which purportedly is attached to the Form 10-K for 1983 which Comsat filed with Securities and Exchange Commission.

[25] M/A-COM has appended to its pleading a copy of an advertisement which allegedly is illustrative of this practice.

[26] *See* Communications Satellite Corporation, 77 FCC 2d 564 (1980) (Comsat Study).

these costs in its jurisdictional revenue requirement. Also, Comsat states that M/A-COM erroneously assumes that the World Systems Division (WSD) and Comsat's Corporate Staff overlap. Comsat asserts that while both are located within the parent corporation, jurisdictional activities are centralized in WSD and nonjurisdictional activities are all housed in subsidiaries that are separated from WSD. Thus, Comsat asserts, while the Corporate Staff may perform work in support of both WSD and the separated subsidiaries, Comsat's current corporate structure and operations do not constitute what M/A-COM characterizes as "a continuing and pervasive integration of Comsat's jurisdictional and nonjurisdictional activities."

25. Comsat also challenges M/A-COM's assertion that in the absence of divestiture additional relief is necessary in the areas of information flow and cost allocations. Comsat asserts that its existing procedures already meet M/A-COM's concerns. Comsat states that documents received from INTELSAT and INMARSAT are available to WSD personnel on a restricted basis and that the Corporate Staff generally obtains this information through Comsat's document distribution program under the same terms and conditions as it is made available to M/A-COM and other interested parties. Comsat maintains that "in those instances where members of the Corporate Staff require INTELSAT or INMARSAT documents to enable them to provide support to WSD, they may receive those documents but only on the same restricted basis as pertains to WSD personnel."[27]

26. As to employee transfers, Comsat submits that the requirements and guidelines contained in the March 30, 1984 information flow letter provide adequate safeguards. Comsat concedes that a WSD employee who is transferred to a competitive subsidiary necessarily carries knowledge obtained while at WSD. But Comsat observes that the same is true when a WSD employee accepts a position with M/A-COM or any other competitor, an occurrence which Comsat describes as "not infrequent."[28]

27. Comsat opposes M/A-COM's requests that the *Second Structure Order* cost allocation procedures be applied retroactively and that Comsat submit retroactive cost studies. Comsat asserts that these procedures are prospective only. Comsat implies that M/A-COM is attempting to persuade the Commission to engage in retroactive ratemaking which, in Comsat's view, is unlawful. Finally, Comsat contends that there is nothing improper about the corporation providing support to COMSAT General in connection with the ARABSAT contract referred to by M/A-COM, especially since Comsat directly charges COMSAT General for all services provided under the agreement. Also, Comsat maintains that although its

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[27] Comsat Opposition at 11.

[28] *Id.* at 12.

Technical Products Group does have its own laboratory facilities and personnel at Comsat Labs, this is not a structural change which requires notification under the *Second Structure Order*.

F. M/A-COM Reply

28. In response to Comsat's opposition to its request for reconsideration and additional relief, M/A-COM reiterates its position that the Commission is obliged to reassess the issue of whether, in light of changing circumstances, the risks of anticompetitive conduct on the part of Comsat are outweighed by the "economies of scale" upon which we purportedly based our initial decision to permit Comsat to engage in non-INTELSAT/INMARSAT activities. Also, based upon Comsat's representations regarding restrictions on Corporate Staff access to INTELSAT/INMARSAT information denied to Comsat's competitors, M/A-COM would have us expressly prohibit the disclosure of all such materials to the Corporate Staff, including the Corporate Development Staff.

III. DISCUSSION

A. Overview

29. In the *Comsat Study* we tentatively concluded that Comsat could lawfully engage in non-INTELSAT/INMARSAT (nonjurisdictional) lines of business where such activities were not inconsistent with Comsat's mission under the Communications Satellite Act of 1962. In the *First Structure Order* we affirmed that view when we determined it to be lawful and in the public interest to permit Comsat to engage in nonjurisdictional ventures subject to regulatory safeguards, including structural separation of its nonjurisdictional lines of business and accounting procedures to ensure that the ratepayer would not bear the financial risks or costs associated with these ventures.

30. In the *Second Structure Order* we reviewed Comsat's structure and cost allocation practices. After carefully scrutinizing the filings and conducting an on-site audit, we reaffirmed our prior decision subject to the modifications to the cost allocation practices which we determined would more fully protect the users of Comsat's jurisdictional services. We also directed the staff to monitor Comsat's cost allocation mechanisms, the activities WSD personnel perform in support of nonjurisdictional Comsat affiliates, Comsat's direct charging/assignment system and Comsat's adherence to the information transfer requirements established in the March 30, 1984 INTELSAT/INMARSAT information flow letter from the Chief, Common Carrier Bureau. We found this level of regulatory oversight sufficient to protect against cross-subsidization and other anticompetitive conduct as identified in the *Comsat Study*. We continue to subscribe to this view. As discussed below, we shall deny the requests by USA and M/A-COM for divestiture of Comsat's nonjurisdic-

tional activites. We are satisfied that existing cost allocation formulas, information flow procedures and structural arrangements have substantially lessened any anticompetitive opportunities. We shall also deny Comsat's request that we: (a) not require its tariff to be targeted to its authorized rate of return; (b) include INTELSAT contracts in its jurisdictional accounts; and (c) exclude partnership expenses from the cost allocation formulas. We shall, however, modify our cost allocation prescription to permit Comsat to employ a "gross operating expenses" formula which takes capital costs into account. Below we discuss the USA and M/A-COM requests for divestiture, the retargeting by Comsat of its rates and the cost allocation formulas.

B. Divestiture

31. The *Comsat Study* initiated a process in which we have continually balanced the potential benefits to the public of permitting Comsat to engage in nonjurisdictional activities against the possibility that Comsat might seek to engage in anticompetitive conduct. We continue to believe that the benefits outweigh the detriments: that technical, commercial, rate, R&D and foreign policy benefits can be maximized while appropriate government oversight and structural, accounting and information flow requirements can minimize anticompetitive activities, prevent cross-subsidies, retard evasion of rate regulation and limit conflicts of interest.[29] While we recognize that the result of this equation can change, thus justifying a greater separation of activities, our conclusion is that the public interest is best served at this point in time by not mandating a divestiture.

32. To more effectively monitor Comsat's financial conduct, we authorized Comsat in 1983 to submit for our approval under Section 210(c)(8) of the Satellite Act, 47 U.S.C. § 721(c)(8), three-year capitalization plans for financing the activities of the corporation.[30] These consolidated capitalization plans enable us to review and assess on an annual basis the current and anticipated financing needs of Comsat's jurisdictional businesses and those of all of its competitive businesses.

33. Moreover, in order to eliminate any "lead time" advantages Comsat may have had given its access to INTELSAT/INMARSAT documents and technical data and information, earlier this year we determined, in concurrence with the Department of State and the National Telecommunications and Information Administration, that U.S. industry

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[29] In the Comsat Study we identified the elimination of the incentives for conflicts of interest, cross-subsidization and evasion of rate regulation as the potential benefits of divestiture. 77 FCC 2d at 696-697.

[30] In the Matter of the Consolidated Capitalization Plan for 1983-85 of the Communications Satellite Corporation (Comsat), I-S-P-83-002, FCC 83-287 (released June 13, 1983), *modified* FCC 83-381 (released August 17, 1983).

and the process by which the three agencies instruct Comsat on matters before INTELSAT and INMARSAT would benefit from public disclosure of non-privileged INTELSAT Board of Governors and INMARSAT Council documents prior to meetings of these two bodies rather than subsequent to them. The program implementing this policy is now in place. It provides opportunity for on-going public input on matters of general and specific interest which the three agencies take into consideration before they issue instructions to Comsat.[31] We believe that this program should mitigate any opportunities Comsat may have had to influence and /or take advantage of the decisions of INTELSAT and INMARSAT with respect to the competitive aspects of satellite system engineering, products and service offerings. The procedures we have put into place should serve to address the concerns of M/A-COM. We nevertheless may revisit the question of divestiture if we find that our safeguards and procedures are not effective.

34. Earlier this year, Comsat, in its role as U.S. Signatory to INTELSAT and INMARSAT, initiated a program of quarterly meetings to inform the public of the actions taken at the most recent INTELSAT Board of Governors and INMARSAT Council meetings and of actions and issues anticipated at upcoming meetings. Comsat has also begun to conduct quarterly public meetings on INTELSAT systems operations, and annual public meetings at Comsat Labs to review jurisdictional R&D projects related to the international satellite communications system. Furthermore, INTELSAT itself has instituted periodic seminars to inform the public of new service offerings and related matters.

35. We find that these recent initiatives on the part of Comsat, INTELSAT and the three governmental agencies responsible for oversight of Comsat's activities, together with the structural, accounting and information flow requirements prescribed in our two *Comsat Structure* decisions provide sufficient protection to the ratepayer and Comsat's competitors. Further, we believe that they should serve to reassure the U.S. public in general and competitors of Comsat in particular that every effort is being made to inform them on a timely basis of INTELSAT/ INMARSAT matters in which they may have an interest.

36. We find that neither USA nor M/A-COM has presented new facts or analyses which would lead us to alter now the basic thrust of our

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[31] The instruction process/information flow procedures outlined above have been recognized in a Memorandum of Understanding agreed to on September 28, 1984, by the President of Comsat, the Chairman of the Commission, the Assistant Secretary for Communications and Information, NTIA and the UnderSecretary for Security Assistance, Science and Technology, U.S. Department of State.

Comsat Structure decisions.[32] To the extent that the arguments for divestiture posited by USA and M/A-COM do raise significant concerns, we believe that the policies and safeguards we have adopted are responsive to these points.[33] Therefore, we shall deny USA's petition for reconsideration and this part of M/A-COM's request for reconsideration and this part of M/A-COM's request for reconsideration and additional relief.[34]

C. Retargeted Rates

37. In anticipation that the cost allocation modifications ordered in our *Second Structure* decision would decrease Comsat's jurisdictional rate base and expenses, thereby lowering its revenue requirement, we directed Comsat to file new rates reflecting this lower revenue requirement and its authorized rate of return of 11.48-12.48 percent. Comsat asserts that this requirement should be rescinded. It claims that its rate of return is not at issue in this proceeding. Moreover, Comsat argues that we are without authority to require it to alter its current tariffs without according it full opportunity for hearing under Section 205 of the Communications Act of 1934, 47 U.S.C. § 205. Comsat believes that prior to our action we were obliged, pursuant to this provision, to consider such relevant factors as changes in the economy and in the corporation since the 11.48-12.48 percent rate of return range was prescribed in 1978. We find Comsat's argument to be without merit and we therefore reject it.[35]

38. Apparently, Comsat believes that in ordering it to retarget its rates to its authorized rate of return of 11.48-12.48 percent, we have prescribed a new rate of return without a hearing. We disagree. We are merely requiring Comsat to bring its current actual rates down to their authorized *level.* That level was arrived at as a result of a Settlement

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[32] For example, the advertisement that M/A-COM appended to its petition as an example of joint promotion refers in fact only to services offered by Comsat under jurisdictional auspices.

[33] In reaching this conclusion we have reviewed M/A-COM's statements relating to Comsat's Corporate Development Staff, separation of employees/operations, employee transfers, consulting contracts, advertising, etc.

[34] We also deny as untimely MCII's request in its opposition to Comsat's petition that we reopen the *Direct Access* inquiry.

[35] Because it relies on essentially the same arguments as Comsat has presented here, we also incorporate by reference and deny Comsat's August 3, 1984 consolidated application for review and request for emergency relief regarding the Order of the Chief, Common Carrier Bureau denying Comsat's request to delay the effective date of the tariff revisions it filed pursuant to the *Second Structure Order. See* Second IBSS Order, note 6 *Supra.* There we denied Comsat request that the effective date of its tariff revisions be postponed until 15 days after the release of decision on the petition before us. In its August 3, 1984 application for review and petition for emergency relief Comsat sought permission to establish an escrow account for the difference the rates which were in effect before and after July 30, 1984 pending out decision on its application for review.

Agreement approved in 1978 both by Comsat's Board of Directors and this Commission. The Agreement itself was the culmination of a rate proceeding which was exceptionally drawn out, commencing in June of 1965, postponed, resumed in 1971, suspended again in 1974, and taken up again for the last time in September of 1974.[36] We released our *Initial Comsat Rate Case Decision* in 1975. Comsat appealed. The effectiveness of the *Initial Comsat Rate Case Decision* was stayed by the United States Court of Appeals for the District of Columbia Circuit pending judicial review. After the court generally upheld our 1975 decision,[37] Comsat filed a petition for rehearing and suggestion for rehearing *en banc* which automatically stayed the court's mandate to the Commission.[38]

39. After the release of the court's decision parties to the appellate litigation determined that a settlement could be reached through negotiations. A settlement proposal was tentatively agreed to by the parties on February 17, 1978 and it was placed on public notice to provide opportunity for public comment. Having reviewed the proposal, which was approved by Comsat's Board of Directors on March 17, 1978, we determined in the 1978 *Settlement Agreement Order* that acceptance of the proposed settlement was in the public interest. We also stated specifically that the agreement "should constitute *a modification of the prescriptions* of our December 1975 decision, after remand."[39] Also, paragraph 5 of the Settlement Agreement (which we appended to our 1978 decision) states: "A Commission Order approving this Settlement Agreement will have *the same prescriptive effect* as if the Settlement Agreement had been incorporated in the Commission's 1975 Rate Decision."[40]

40. We have reviewed the history of the "Comsat Rate Case" at length to establish, unequivocally, that Comsat's authorized rate of return of 11.48-12.48 percent was prescribed after Comsat was afforded a full opportunity for hearing with the right of cross-examination.[41] Comsat had every opportunity since the 1978 Settlement Agreement to petition us for relief if it believed its authorized rate of return was too low and did not reflect the changed circumstances to which it refers in its petition for reconsideration. For whatever reason, it did not do so. Until it does so and until relief is granted, Comsat shall submit tariffs reflecting cost-based

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[36] Settlement Agreement Order, note 6, *Supra.*

[37] *See* Communications Satellite Corporation v. FCC, 611 F. 2d 883 (D.C. Cir. 1977).

[38] Settlement Agreement Order, note 6, *Supra* at 942-943.

[39] *Id.* at 953 (emphasis added).

[40] *Id.* at 955 (emphasis added).

[41] Indeed, the Court of Appeals in *Communications Satellite Corporation v. FCC* specifically so held. 611 F. 2d at 887-888.

rates that will earn the corporation its authorized rate of return. Comsat simply cannot unilaterally modify its authorized rate of return.

41. We note that Comsat's authorized rate of return is 11.48% plus one percent for efficiency. This does not mean that Comsat may target a return of 12.48%. Rather, it means that Comsat should set its rates to earn a return of 11.48% and that up to 12.48% may be earned without regulatory action on our part if the additional earnings can be tied to operational efficiencies. In the *Initial Comsat Rate Case Decision*, we stated: "The purpose of establishing a range of rate of return is to provide a carrier with the incentive, on a rate *designed to yield a return at the low end of the range, to achieve a return at the upper end* of the range through operating and internal efficiencies".[42] One of the issues raised by Comsat's tariff filing in response to our *Second Structure Order* was whether Comsat had targeted its rates at 11.48 percent or at some other percentage. We intended to investigate this issue. However, it appears from Comsat's pleadings that the corporation has indeed set its rates to earn a 12.48 percent equity.[43] Such a targeting is inconsistent with the Settlement Agreement and existing precedent. We shall therefore require Comsat to refile its tariffs, targeting them at a 11.48 percent rate of return.

D. Cost Allocation Formulas

42. Comsat urges the Commission to: (a) include its capital costs as an element in the G&A and R&D shared expenses and capital costs allocation formulas we have prescribed; (b) delete the requirement that it treat the expenses associated with its partnerships and joint venture the same as it treats its subsidiaries for allocating residual G&A and R&D expenses; and (c) permit Comsat to treat all INTELSAT contracts as jurisdictional. After reviewing our Order and the pleadings, we will grant Comsat's petition only to the extent that rather than the "cash expenses" formula prescribed in the *Order*, Comsat may utilize a "gross operating expenses" formula, which does take into account capital costs, to allocate G&A and R&D shared expenses and capital costs between its jurisdictional and nonjurisdictional accounts. Its requests concerning treatment of its partnerships, joint ventures and INTELSAT R&D contracts will be denied.

43. *General allocation formulas for shared G&A and R&D expenses and capital costs.* In our prior decision, we sought to arrive at a general formula for allocating shared G&A and R&D expenses and capital

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[42] Communications Satellite Corporation, 56 FCC 2d 1101, 1173 (Initial Comsat Rate Case Decision) (emphasis added). *See also*, AT&T, 9 FCC 2d 960, 962 (1967), AT&T, 51 FCC 2d 619, 625 (1975).

[43] Communications Satellite Corporation's Reply Comments and Opposition to Petitions for Suspension, Investigation, and Prescription, pp. 6-8 (June 23, 1984).

costs which best reflected the current direction and activities of the corporation as well as its relative use of resources. Throughout the course of this proceeding, we have considered four basic options with their attendant modifications: the "three-factor" formula, "gross expenditures," "gross operating expenses" and "cash expenses." We prescribed the "cash expenses" methodology in the *Second Structure Order*.

44. Comsat requests that we modify this requirement. Comsat asserts that because the "cash expenses" allocative factor relies solely on current gross operating expenses without allowance for additions to capital or depreciation, it does not recognize the capital costs incurred by the corporation. Comsat does not quantify the impact of the application of the "cash expenses" formula on the amount of G&A residual expenses and capital costs which would be charged to its jurisdictional lines of business. Comsat maintains, however, that use of this allocative factor, in conjunction with our requirements that it include its share of the expenses of the partnerships and joint ventures in which it is involved and exclude INTELSAT contracts from the formula, will decrease from approximately 70 percent to only 20 percent the amount of basic corporate R&D expenses which would be funded by the jurisdictional ratepayer.[44] Also, Comsat asserts that rather than including 75 percent of the capital costs associated with Comsat Labs, as has been the case since the *Comsat Rate Case* settlement agreement, our new requirements would reduce that figure to less than 13 percent.

45. Because Comsat believes that these results would unfairly burden its nonjurisdictional businesses in terms of support for the Labs, and ultimately would alter entirely the nature and function of these facilities, Comsat asks that we remove our requirements. Comsat requests that we modify our prior Order by adopting a general allocative formula which includes capital as a factor. For the reasons we shall now discuss, we are modifying the *Second Structure Order* to permit Comsat to use "gross operating expenses" as its general allocative factor for G&A and R&D residual expenses and capital costs in lieu of "cash expenses."

46. In the first *Comsat Structure Order*, we reviewed Comsat's use of the so-called "three-factor formula" to allocate shared G&A expenses between its jurisdictional and nonjurisdictional accounts. Under this formula, shared costs are to be allocated to each of Comsat's corporate elements by calculating the ratio of the average of each element's payroll dollars, operating revenues and capital assets to the total for the corporation as a whole. Comsat sought to justify use of this methodology on the grounds that it is a generally accepted cost apportionment

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[44] Comsat's 70 percent calculation is based upon its utilization of the "gross expenditures" formula under what Comsat terms the "matrix" approach. We define and discuss this methodology below.

technique which has been promulgated by the Cost Accounting Standards Board (CASB), and that as a government contractor with a residual pool that exceeds the CASB's threshold percentage of revenues, Comsat is required to conform to this standard.[45] While we recognized that use of the "three-factor" formula is appropriate in some cases, we nevertheless prohibited Comsat from using it to allocate residual G&A costs *between* its jurisdictional and nonjurisdictional accounts.[46] We did so upon a finding that the "three-factor" formula would likely unfairly burden the ratepayer and enable Comsat to cross-subsidize its competitive activities. We therefore directed Comsat to submit for our consideration an alternative cost allocation methodology and suggested that Comsat consider allocating residual expenses based on "gross operating expenses."[47]

47. In its May 9, 1983 Supplemental Report, Comsat provided results, based on actual financial data for the period January 1, 1983 to March 31, 1983, of the use of two alternative allocative factors: "gross operating expenses" and "gross expenditures." The "gross operating expenses" formula Comsat employed consisted of total cash operating expenses including depreciation and intercompany support charges and excluding expenses transferred to construction in a given year.[48] This is the formula which we twice suggested Comsat consider because we felt it assured an apportionment of shared costs that was reflective of what is happening in Comsat's unique organization and complement of businesses.[49] Comsat disagreed, stating that in its view the "gross operating expenses" methodology relied too heavily upon depreciation, which is a measure of past rather than current and future activity. Comsat therefore proposed to employ as its allocative factor to reflect the current and future activities of the corporation a "gross expenditures" formula—gross operating expenses less depreciation plus additions to property.

48. In the petition before us, Comsat claims that a formula based upon "cash expenses" would be devastating in that only 20 percent of corporate-initiated *R&D expenses* would be ratepayer-funded. In the May

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[45] *See, e.g.*, Report of Communications Satellite Corporation on Allocations of Costs of Shared Services and Comsat Labs, pp. 11-17 (January 24, 1983) (January 1983 Report).

[46] Comsat Structure Order, 90 FCC 2d at 1182-83. We emphasize here that we are not prohibiting Comsat from using the three-factor formula for allocating residual G&A costs *among* its nonjurisdictional elements in order to comply with CASB contract standards.

[47] *Id.* at 1184.

[48] Supplemental Report at p. 11, n. 20.

[49] Comsat Structure Order, 90 FCC 2d at 1184. *See also*, March 31, 1983 letter from William J. Tricarico, Secretary, Federal Communications Commission, to Lawrence M. DeVore, Vice President and General Counsel World Systems Division, p. 2 (released April 28, 1983).

9, 1983 Supplemental Report Comsat calculated that under a "gross expenditures" formula utilizing the "matrix" approach 69.7 percent of these expenses would be allocated to the ratepayer.[50] Comsat also calculated that 49.6 percent of all shared basic R&D expenses would be attributable to the ratepayer under a "gross operating expenses" formula using the matrix approach.[51] With respect to the *R&D capital costs* to be allocated to its jurisdictional accounts, Comsat maintains that the cumulative effect of the *Second Structure Order* would be to reduce the allocation from 75 to less than 13 percent.[52] Figures derived by Comsat in its Supplemental Report show that under "gross expenditures," the amount of Labs' investment to be included in jurisdictional accounts would be 45.6 percent with the matrix.[53] But under "gross operating expenses" the percentage drops to 38.4 percent.[54] As to shared *G&A expenses,* Comsat stated in its Supplement Report that use of the "gross expenditures" formula resulted in an allocation to its jurisdictional accounts of 66.5 percent of its total shared G&A expenses (54.8 percent to WSD; 11.7 percent to Comsat Labs). Under the "gross operating expenses" formula, the corresponding percentage was 55.2 (40.1 to WSD; 15.1 to the Labs).[55] Comsat provided no data for *G&A capital costs.*

49. In the *Second Structure Order* we rejected as a matter of policy Comsat's proposal to use "gross expenditures." "Gross expenditures" includes as a factor yearly capital outlays. As we stated in our prior *Order*, this factor leads to distortions because it would permit Comsat to account for in a single year the total costs of additions to property although these additions normally last between seven and thirty years and may not come on line for several years. Because such additions must be amortized over their useful lives to truly reflect the annual expense of the capital outlay involved, we determined in the *Second Structure Order* that additions to property are relevant to yearly activity only when the costs of these activities are properly divided by the lifetime of the property. This does not occur under "gross expenditures." Use of a "gross

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[50] Supplemental Report, Exhibit D-1. The "matrix" approach is the methodology Comsat proposed to assign the cost/benefits of all Labs-initiated projects to Comsat's multiple elements. We have approved Comsat's use of the "matrix" approach under the conditions set for in paragraph 65-68 of the *Second Structure Order.* We affirm those conditions today.

[51] *Id.*

[52] Comsat does not state how much of this impact would be attributable directly to our requirement that it use the "cash expenses" formula, as opposed to our additional requirements that it exclude INTELSAT contracts and include the expenses of its partnership and joint ventures in its allocation formulas.

[53] Supplement Report, Exhibit E-1. Were INTELSAT and government contracts to be included in the formula the corresponding figure would be 69.1.

[54] *Id.* This percentage would be 61.9 were INTELSAT and government contracts included.

[55] *See* Supplemental Report, Exhibits A-3, B-3.

expenditures" formula may, therefore, skew the allocation of shared G&A and R&D expenses and capital costs from Comsat's nonjurisdictional accounts to its jurisdictional accounts. Consequently, we affirm our prior decision that the "gross expenditures" methodology is unacceptable because it is theoretically deficient as an indicator of capital employment and does not reflect Comsat's activities, corporate direction and use of resources.

50. At the same time, we are persuaded by Comsat's argument that an allowance for capital expenses is appropriate. We recognize that the selection of the proper cost allocation formula for any corporation with elements at different stages of maturity is a difficult task. Based upon the record in this proceeding, including the data submitted by Comsat in conjunction with the tariff revisions it filed on June 15, 1984 in compliance with our *Structure Order*, we conclude that Comsat's plea is reasonable. We shall therefore modify our policy and permit Comsat to employ the "gross operating expenses" formula, which takes depreciation into account, to allocate its shared G&A and R&D residual expenses and capital costs.[56]

51. By including depreciation, the "gross operating expenses" formula recognizes the capital assets of Comsat's various lines of business. We recognize that the results yielded in Comsat's Supplemental Report reflect the activity of the corporation during only a brief three-month period and therefore may not be totally indicative of the results Comsat will obtain in the future as a result of today's decision. We nevertheless believe that "gross operating expenses" is the suitable method to be employed to allocate Comsat's shared G&A and R&D expenses and capital costs. In short, we find as a matter of policy that depreciation is for our purposes the most appropriate measure of Comsat's capital activity. Moreover, we find from our preliminary review of Comsat's 1984-86 Capitalization Plan that the application of the "gross operating expenses" cost allocation formula yields results which closely approximate the capital structure of the corporation.[57] Finally, we find that the results likely to be produced under the "gross operating expenses" formula will be generally consistent with the observations of the staff regarding the

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[56] Letter from Lawrence M. DeVore, Vice President, Law and Administration, COMSAT World Systems Division, to William J. Tricarico, Secretary, Federal Communications Commission, June 15 (1984). (Comsat Tariff Transmittal Letter)

[57] I-S-P-83-002, Communications Satellite Corporation Capitalization Plan, Attachment 2, Detailed Balance Sheet-Consolidated, Confidential Chart 3, p.1. In referring to these projections we are in no way approving the Plan itself. Rather, we are endeavoring to reach a decision on the proper cost allocation formula to be employed based upon the most up-to-date information about the activities of the corporation which we have at our disposal. The Comsat Capitalization Plan is the subject of another proceeding and will be acted upon in its appropriate context.

relative use of corporate personnel and resources made during the course of its August-September 1983 on-site examination of Comsat's records and books of accounts.

52. In view of the foregoing, we direct Comsat to allocate its shared G&A and R&D expenses and capital costs by using "gross operating expenses" as defined above in paragraph 47. We note that the books of accounts which Comsat maintains for its nonjurisdictional activities take depreciation into account for tax purposes differently than do our accounting rules for jurisdictional activities. We shall allow Comsat to employ the depreciation schedules and methodologies it is permitted to utilize for tax purposes in its use of the "gross operating expenses" cost allocation formula to allocate shared G&A and R&D expenses between its jurisdictional and nonjurisdictional accounts.

53. *Cash expenses of partnerships and joint ventures.* In the *Second Structure Order* we rejected Comsat's argument that since it does not solely own and control its partnerships and joint ventures, no residual G&A and R&D expenses should be assigned to them. We did so upon a determination that Comsat is not a passive investor in these enterprises, but rather is heavily involved in their direction and planning.

54. Comsat in its petition does not dispute our findings. Instead, Comsat seems to imply that but for the inclusion of its investment in SBS for the allocation of Common Stock Costs, Shareholder Meeting Expenses and Executive Costs, neither SBS nor any of Comsat's other partnerships or joint ventures derives any benefit from the activities reflected in the residual pool. We again reject this argument. As indicated in the *Order* the staff found numerous instances of Headquarters support where no direct charge or assignment to SBS was made. Moreover, Comsat apparently would have us presume that its other partnerships and joint ventures pay fully for Headquarters and Labs support by the direct charging method. On the basis of our study of Comsat's support of SBS, we decline to make that presumption. Also, although we encouraged Comsat to provide specific examples that its partnerships and joint ventures are receiving no support from Comsat because they are performing particular G&A functions themselves, Comsat provided such examples only for SBS.[58] It made no mention, for example, of Intelmet, a partnership which was explicitly addressed in the *Order*. In sum, Comsat has provided no new information which would convince us to reconsider our requirement that it treat SBS and other partnerships on the same footing as it treats its subsidiaries for allocating residual G&A and R&D expenses.

55. We note Comsat's assertion that including its share of SBS' expenses in the denominators of the general residual costs allocation

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[58] Comsat Petition at p. 11, n. 23.

formulas would result in an additional 15 percent of the entire corporate-initiated R&D program being transferred to nonjurisdictional accounts. If that projection is correct then Comsat's shareholders properly should bear this expense. We also note, however, that Comsat is now in the process of removing itself entirely from the SBS partnership by selling its share to IBM and Aetna. If an agreement is reached and is approved by the Commission, Comsat's concerns should be mitigated.

56. We note further that Comsat has recently agreed to form a new venture with United Satellite Communications Inc. to engage in direct satellite broadcasting and is reorganizing its STC subsidiary to engage in this activity.[59] Were we to accept Comsat's reasoning, its STC subsidiary would have to be removed from the denominator of the allocation formula simply because it has evolved into a partnership. This result is unacceptable. Comsat will be no less accountable for its equity-based share of STC expenses if its agreement with United Satellite Communications Inc. is formalized than it was as the sole owner of the company. Therefore, we reject Comsat's request to exclude its share of the expenses of its partnerships and joint ventures from the general allocations formulas. We shall, however, clarify our prior *Order* in the following manner. We will grant exceptions to our policy of including Comsat's share of the expenditures of its partnerships and joint ventures in the denominator of the allocation formulas for all residual R&D expenses as well as the residual Headquarters G&A expenses to which we specifically referred in the Order,[60] but only upon a clear showing by the particular joint venture that it is receiving no support from Comsat because it is performing a particular function itself. We also accept Comsat's proposal to allocate directly to COMSAT General's BCI subsidiary a percentage of the executive costs of the entire corporation before the remainder of these costs are allocated through the residual pool. Comsat's request regarding the treatment of its partnerships and joint ventures is otherwise denied.

57. *INTELSAT contracts for R&D.* On the grounds that all of its INTELSAT-related activities are jurisdictional and that U.S. ratepayers derive benefits from R&D performed under contracts let by INTELSAT, Comsat requests that we reconsider our decision to remove from its jurisdictional accounts all R&D expenses associated with INTELSAT and INMARSAT contracts. Comsat's request is denied. As we stated in our two prior orders, performance of such contracts is mandated neither by the Satellite Act nor the INTELSAT Agreements. We are unpersuaded that because laboratories within the jurisdictions of other Signatories are more often than not government-run or subsidized, the U.S. ratepayer should be made to compensate Comsat for revenue shortfalls that may

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[59] "Comsat Starts Reorganizing its STC Unit," Washington Post, p. F1, October 3, 1984.

[60] 97 FCC 2d at 176, n. 47.

occur as a result of an unrealistically low bid tendered by Comsat and accepted by INTELSAT. Contrary to Comsat's assertions, we declare here that not all relationships with INTELSAT are jurisdictional. The ratepayer is not obliged, at Comsat's discretion, to subsidize R&D projects which also benefit foreign Signatories and entities within their jurisdictions without their having made any contribution.

58. The issue has arisen in large measure because as INTELSAT has evolved so too has Comsat's statutory mission. No longer the sole provider of technical and operational services to INTELSAT, Comsat is now merely one of a myriad number of R&D sources for INTELSAT. As we stated in the *Second Structure Order*, INTELSAT R&D contracts are "voluntarily entered into by Comsat as a competitive vendor of services, and as such are not related to Comsat's mission under the Communications Satellite Act of 1962."[61] Nothing in Comsat's pleading convinces us otherwise. Therefore, if Comsat Labs wishes to continue to contract with INTELSAT for R&D work it either must do so at a price which covers the fully-allocated costs of the project or be compensated for any shortfall through allocations to its nonjurisdictional accounts. Since both the contract costs and the revenues derived from the contract work are nonjurisdictional accounting entries, we do not believe that any harm should occur to Comsat. If the contract price exceeds costs, the shareholder will benefit. If the contract price is less than the costs, then the shareholder will bear the loss. We do not view this outcome as contrary to U.S. trade or foreign policy goals. What is contrary to this Commission's goals is the funding by ratepayers of voluntary R&D contracts won by Comsat with below-cost bids. Consequently, we also deny Comsat's request that it be accorded a transition period to negotiate with INTELSAT to increase its charges for work performed under INTELSAT R&D contracts.

59. *Special G&A expenses.* As a final matter, we wish to address the fact that in paragraph 51 of the *Second Structure Order* we accepted Comsat's proposal that it be permitted to allocate certain of its shared Headquarters Division expenses—Payroll, Human Resources, Compensation and Benefits, Employee Relations, Human Relations and EEO, Safety and Health, Credit Union and Trust Fund Administration—be allocated on the basis of the "special factor" of personnel count of its subsidiaries and WSD. Noting that Comsat omitted all Headquarters staff groups from the denominator, or total personnel count, of its special factor formula, however, we required Comsat to include them. In its pleading, Comsat finds our requirement unclear. It states that it can be read as requiring a portion of the costs to be allocated to the very staff whose costs are being

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[61] *See* Comsat Study, 77 FCC 2d at 592-3, 598.

allocated. As this was not our intention, we shall delete the last sentence of paragraph 51 of the Order and add the following clarifying language:

> Since this omission would distort the allocation process, we believe it appropriate for Comsat to include in its total personnel count all Headquarters staff members whose expenses are not subject to this special allocation factor formula. That is, all Headquarters personnel are to be included in the denominator of the special factor formula with the exception of the following staff members: Payroll, Human Resources, Compensation and Benefits, Employee Relations, Human Relations and EEO, Safety and Health, Credit Union and Trust Fund Administration.

60. *Tariff Filings.* Pursuant to our *Second Comsat Structure Order* Comsat filed tariff revisions reflecting a 5.76% rate reduction ($1125 to $1060 per voice-grade circuit per month). Based on the data submitted by Comsat in support of these tariff revisions, Comsat projected that were we to grant its reconsideration petition in full, its tariff rate reduction would be 3.67% ($1125 to $1083).[62] Since in today's decision we grant Comsat's petition only in part, we would expect the rate reduction derived solely from our prescribed refinements to the cost allocation formula to fall somewhere between 5.76% and 3.67%. Of course, any rate resulting from these refinements would have to be further modified to take into account our requirement that Comsat retarget its tariffs to generate revenues consistent with its authorized rate of return of 11.48%.

IV. ORDERING CLAUSES

61. ACCORDINGLY, IT IS ORDERED, that the petition for reconsideration and additional relief filed by M/A-COM, Inc. and the petition for reconsideration filed by United Satellite Action are DENIED.

62. IT IS FURTHER ORDERED, that the request of MCI International, Inc. that we reopen the *Direct Access* proceeding is DENIED.

63. IT IS FURTHER ORDERED, that the petition for reconsideration filed by Communications Satellite Corporation is GRANTED in part and DENIED in part.

64. IT IS FURTHER ORDERED, that Comsat make changes to its accounting and cost allocation system as set forth herein at paragraph 52.

65. IT IS FURTHER ORDERED, that Comsat implement these accounting changes within 45 days of this order, that Comsat file new tariffs based on the resulting revenue requirement changes and target at a rate of return not to exceed 11.48 percent, and that the new tariffs be filed on February 1, 1985 to become effective on 45 days' notice.[63]

66. IT IS FURTHER ORDERED, that paragraph 51 of the *Second Structure Order* is clarified as indicated in paragraph 59 herein.

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[62] Comsat Tariff Transmittal Letter, *Supra* at Attachment II, Exhibit 7.

[63] The new filings shall become effective on 35 days' notice if a rate decrease is transmitted in the tariff revisions. 47 CFR § 61.58(c)(3).

67. IT IS FURTHER ORDERED, that Comsat's application for review and petition for emergency relief, dated August 3, 1984, is DENIED.

68. IT IS FURTHER ORDERED, that the Secretary shall cause a copy of this order to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Common Carrier
Customer Premises Equipment
National Defense

Commission adopted *Sixth Report and Order* creating a framework for provision of customer premises equipment associated with national security and emergency preparedness communications.
—Customer Premises Equipment
CC Docket No. 81-893

FCC 84-652

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of

Procedures for Implementing The Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry)	CC Docket No. 81-893

SIXTH REPORT AND ORDER

Adopted: December 21, 1984; Released: January 4, 1985

BY THE COMMISSION:

I. Introduction

1. This Order creates a framework under which certain federal agencies[1] will be able to obtain equipment and service needed for national security and emergency preparedness (NSEP) communications. The framework the Commission is creating will allow the American Telephone and Telegraph Company (AT&T), through its subsidiaries AT&T Information Systems (AT&T-IS) and AT&T Communications (AT&T-C), and the Bell Operating Companies (BOCs) to provide the specified federal

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[1] The federal agencies involved are the Department of Defense (DoD), the Department of Energy, the Department of the Interior, the Department of Transportation (including the Federal Aviation Administration and the Coast Guard), the General Services Administration, the Central Intelligence Agency, the Federal Emergency Management Agency, the National Aeronautics and Space Administration, the United States Information Agency, and the Nuclear Regulatory Commission. These agencies are hereinafter referred to as the "specified federal agencies."

agencies with customer premises equipment (CPE) for certain NSEP systems and in certain emergency situations.[2] At the heart of this framework is a waiver which will allow AT&T-C and the BOCs to act as a single point of contact for these agencies to facilitate the operation, maintenance, and servicing of NSEP CPE.[3] In addition, independent telephone companies (ITCs) will continue to be able to act as a single point of contact for NSEP communications needs.[4]

II. Background

2. In *Second Computer Inquiry*[5] we established a set of rules[6] which require AT&T to provide CPE through a fully separated subsidiary which is not subject to tariff regulation. We also required that those subsidiaries of AT&T which are subject to tariff regulation, such as AT&T-C, be prohibited from engaging in the provision of CPE. In 1983 we adopted a limited waiver of these Computer II Rules to permit the BOCs and AT&T Long Lines (the predecessor of AT&T-C) to furnish new CPE to federal agencies to meet NSEP communications needs.[7] The Department of Defense (DoD) and other specified federal agencies were authorized to obtain new CPE from AT&T Long Lines and the BOCs in emergencies

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[2] *See* nn.8, 18, *infra.*

[3] AT&T has indicated that a waiver for NSEP purposes would be unnecessary if its Federal Systems Organization (FSO) petition is granted. AT&T Direct Comments at 2. In creating a waiver in this Order we do not endorse or deny AT&T's FSO petition; the policies established here will govern the provision of NSEP equipment by AT&T until we take further action.

[4] A specific waiver for the ITCs is unnecessary since they are not restricted by separate subsidiary requirements which would prevent their acting as a single point of contact for NSEP. See para. 2, *infra.* The waiver granted in this Order is simply a means of allowing AT&T and the BOCs the same flexibility for NSEP provisioning which the ITCs enjoy in all of their operations. We also note that the detariffing requirements of this Order do not apply in any way to any ITC CPE tariffed at the federal or state levels. As we indicated in CC Docket No. 81-893, Third Report and Order, FCC 84-483, Mimeo No. 35148 (released Oct. 26, 1984), NSEP CPE owned by the ITC's will be detariffed at some future date pursuant to a Notice of Proposed Rulemaking which will be issued in the near future. Until an Order is adopted which specifically detariffs NSEP CPE owned by the ITC's, such equipment will remain under tariff.

[5] 77 FCC 2d 384, *recon.*, 84 FCC 2d 50 (1980), *further recon.*, 88 FCC 2d 512 (1981), *aff'd sub nom. Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[6] Section 64.702 of the Commission's Rules and Regulations, 47 C.F.R. § 64.702 (hereinafter Computer II Rules).

[7] AT&T Petition for Waiver of Section 64.702 of the Commission's Rules and Regulations with Respect to the Department of Defense and Specified Government Agencies, ENF 83-13, Memorandum Opinion and Order, 93 FCC 2d 632 (1983) (hereinafter *CPE Waiver Order*).

declared by the President and in certain other emergencies.[8] They were also authorized to obtain service from AT&T-C and the BOCs in other situations in which sole source procurement is permitted under federal regulations. New CPE furnished under the waiver could not be provided under tariff or added to the embedded rate base. The waiver was to expire on the date of divestiture of the BOCs from AT&T. *CPE Waiver Order* at para. 18.

3. Effective on January 1, 1984, at the same time as the AT&T divestiture, we ordered as part of the ongoing *Second Computer Inquiry*, that the embedded CPE owned by the BOCs be detariffed and transferred to AT&T-IS.[9] In the comment period preceding the *CPE Detariffing Order* the Federal Executive Agencies (FEA) argued that embedded CPE associated with certain NSEP systems[10] should not be detariffed and transferred to AT&T-IS, but rather should be transferred to AT&T-C so that end-to-end service to DoD and the other specified federal agencies could be maintained. In the *CPE Detariffing Order* we rejected FEA's approach and concluded that all CPE should be detariffed and transferred to AT&T-IS. *CPE Detariffing Order*, 95 FCC 2d at 1376. We provided, however, that the detariffing of embedded CPE in NSEP systems would not occur until June 1, 1984, in order to provide interested parties with the opportunity to comment on the issues raised by FEA and to provide time for them to request waivers from the detariffing requirements. *Id.*

4. AT&T, at the request of DoD and the other specified federal agencies, submitted a petition for such a waiver.[11] The AT&T petition requested that all embedded CPE be transferred to AT&T-IS as of January 1, 1984, and that AT&T-C be allowed to continue serving as the single point of contact for the provision of NSEP services To implement these requests AT&T asked that the Commission waive the Computer II Rules as of January 1, 1984, to the extent necessary to permit AT&T-C to be responsible for this CPE as part of its end-to-end service. AT&T also asked that AT&T-C be allowed to continue obtaining new CPE for the designated NSEP systems.

5. On December 29, 1983, the Chief, Common Carrier Bureau, issued an Order in this docket granting the AT&T waiver requests on a temporary basis subject to certain terms and conditions.[12] The *Bureau*

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[8] Defense Communications Agency Circular 310-130-1, Ch. II, para. 2 (Feb. 1982) defines these other emergency situations. *See CPE Waiver Order* at para. 7 n.6.

[9] CC Docket No. 81-893, Report, and Order, 95 FCC 2d 1276 (1983) (hereinafter *CPE Detariffing Order*).

[10] For a list of these systems see *CPE Detariffing Order*, 95 FCC 2d at 1375 & n.146.

[11] AT&T Petition, ENF 83-13 (filed Dec. 14, 1983).

[12] CC Docket No. 81-893, Order, Mimeo No. 1705 (released Jan. 10, 1984) (hereinafter *Bureau Waiver Order*).

Waiver Order waived the provisions of the *CPE Detariffing Order* which required that embedded CPE associated with NSEP systems be tariffed at the federal level until June 1, 1984, waived the Computer II Rules in the manner sought by AT&T, and extended all the provisions of the *CPE Waiver Order* (but narrowed the waiver to apply only to the 21 systems and circuits designated by FEA). *See Bureau Waiver Order* at paras. 13-17. The *Bureau Waiver Order* provided that the waiver would expire on May 31, 1984. *Id.* at para. 21. On May 24, 1984, the Commission extended the waivers adopted in the *Bureau Waiver Order* from May 25, 1984, to December 31, 1984.[13]

6. In the *Bureau Waiver Order* the Bureau noted that it would recommend the issuance of a proposed rulemaking in this docket "to solicit comments from all interested parties regarding an appropriate framework for meeting the NSEP communications needs of DoD and the specified federal agencies in a manner which gives due consideration to *Second Computer Inquiry* requirements and principles." *Bureau Waiver Order* at para. 1 n.4. On June 20, 1984, the Commission released such a proposed rulemaking.[14] In the *Second Notice* we proposed four options for the provision of NSEP CPE consistent, to the extent possible, with the requirements of the Computer II Rules.[15] Under Option I we proposed to amend, or permanently waive, the Computer II Rules to enable AT&T-C to serve as single point of contact for the 21 NSEP communications systems specified by FEA.[16] AT&T-IS would own the embedded CPE for these systems, but AT&T-C would be responsible for it and for any new equipment which AT&T-C might acquire to preserve existing capabilities. The same arrangement created for AT&T would also apply to any embedded CPE retained by the BOCs and used in connection with NSEP functions.[17] Under Option II AT&T-C would retain or receive ownership of embedded CPE associated with the designated NSEP systems. This option would also require that AT&T-C be permitted to own and provide new CPE associated with these systems. The third option (Option III) proposed expanding the role of Bell Communications Research Incorporated (Bellcore) to supplant any end-to-end responsibility for NSEP communications needs currently performed by AT&T-C. Bellcore would become the industry-wide point of contact for DoD and the other specified federal

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[13] CC Docket No. 81-893, Order, 49 Fed. Reg. 28108 (July 10, 1984) (hereinafter *Second Bureau Waiver Order*).

[14] CC Docket No. 81-893, Second Further Notice of Proposed Rulemaking, FCC 84-238, 49 Fed. Reg. 26109 (released June 20, 1984) (hereinafter *Second Notice*).

[15] For a detailed description of the four proposed options *see Second Notice* at paras. 9-19.

[16] For a list of the 21 NSEP systems (hereinafter the " 'designated NSEP systems") see Appendix A. For a description of each system, see Appendix B.

[17] Acquisitions by AT&T-C and the regulated BOC entities would be in accordance with the terms of the *CPE Waiver Order.*

agencies for all NSEP communications needs. Full *Second Computer Inquiry* separations requirements would apply to relationships between AT&T-C and AT&T-IS, and to relationships between regulated and unregulated BOC entities. AT&T's embedded CPE used for the designated NSEP systems would be detariffed and transferred to AT&T-IS. The final option proposed in the *Second Notice* (Option IV) would require AT&T-IS, rather than AT&T-C, to function as the single point of contact for the designated NSEP systems. Under this option all embedded CPE associated with the designated NSEP systems would be transferred to AT&T-IS. AT&T would be required to provide new CPE for these systems only through AT&T-IS, and AT&T-IS would be permitted to resell basic transmission service acquired from AT&T-C or other carriers.

III. Comments

7. Ten parties have filed comments or reply comments in response to our *Second Notice.*[18] These comments fall into two groups, those which supported Option I and those which supported Option III. No party offers any support for Option II or for Option IV.

8. Support for Option I focuses on the requirements of national security. Option I is viewed as a close approximation of the *status quo* because it would allow AT&T-C to act as an NSEP single point of contact for DoD and the other specified federal agencies.[19] FEA deems it essential that this single point of contact be maintained to ensure equipment compatibility, comprehensive system coverage, maximum system performance, and the minimization of any risk of unauthorized disclosure.[20] FEA further indicates that AT&T-C has the experienced personnel who understand these systems, without whose expertise and special handling unacceptable outages could occur.[21] Option I is portrayed as a means of allowing AT&T and the BOCs to provide the same type of end-to-end services for the designated NSEP systems that their competitors are already allowed to provide.[22]

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[18] Parties filing are: American Satellite Company (ASC), the Ameritech Operating Companies (Ameritech), AT&T, FEA, GTE Corporation (GTE), Mountain States Telephone and Telegraph Company with Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company (Mountain States), Rolm Corporation (Rolm), Teltec Saving Communications Company (Teltec), and the Telephone Companies (composed of the Bell Telephone Company of Pennsylvania, the Chesapeake and Potomac Telephone Companies, the Diamond State Telephone Company, Nevada Bell, New England Telephone and Telegraph Company, New Jersey Bell Telephone Company, New York Telephone Company, Pacific Bell, South Central Bell Telephone Company, Southern Bell Telephone and Telegraph Company, and Southwestern Bell Telephone Company).

[19] FEA Direct Comments at 6; AT&T Direct Comment at 3.

[20] FEA Direct Comments, appendix at 7.

[21] *Id.* at 8.

[22] FEA Reply Comments at 10-11; AT&T Reply Comments at 3.

9. Option I also receives support as the alternative which upheld the competitive goals of *Second Computer Inquiry.*[23] Several commenting parties indicate that the extension of the waiver to the BOCs would allow them into the NSEP market and would increase AT&T's competition in the provision of NSEP.[24] Parties also note that this option would provide additional sources of end-to-end service to the federal government in emergency situations.[25]

10. Opposition to Option I is motivated almost exclusively by an alleged threat to competition in the market for national security communications which would result from a waiver of the Computer II Rules in favor of AT&T. GTE argues that suppliers which are qualified to take part in the management of government communications systems would be precluded from bidding for full participation in such systems.[26] ASC suggests that any waiver of the computer II Rules could be used as the basis for non-competitive procurement for government communications.[27] Rolm notes that the Commission has continually rejected applications for Computer II Rules waivers in the past and it should do so here.[28] Finally, GTE indicates a belief that there has been no adequate showing that only AT&T or the BOCs can provide critical NSEP systems or CPE, especially since DoD has stated that other companies are viable candidates for providing end-to-end NSEP services.[29]

11. GTE indicates that should the Commission accept Option I, AT&T's activities should continue to be monitored to prevent any AT&T advantage. GTE suggests that current reporting requirements must be preserved and the Commission should require additional pre-transaction reports on any transaction involving the waiver.[30] FEA opposes any form of advance Commission review and approval of waivers. It suggests that the proposal would put the Commission in the place of the General Accounting Office and would require the Commission to assess agency judgments.[31] FEA also notes that the pre-approval did not distinguish between routine and emergency NSEP requirements and requiring such approval in emergency situations could cause unacceptable delays.[32]

12. The Telephone Companies and Mountain States, although generally supportive of Option I, propose a modification in the way it deals with

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[23] Telephone Companies Direct Comments at 3.

[24] *Id.* at 3; FEA Reply Comments at 2.

[25] FEA Direct Comments at 7.

[26] GTE Direct Comments at 2.

[27] ASC Direct Comments at 2.

[28] Rolm Reply Comments at 2.

[29] GTE Direct Comments at 5-6.

[30] GTE Direct Comments at 10.

[31] FEA Reply Comments at 16.

[32] *Id.*

augmentation of the designated NSEP systems. Under the *Bureau Waiver Order,* and under Option I as proposed, AT&T is allowed to augment existing NSEP systems. These parties indicate that, to prevent abuse, Option I should be modified to create a clear line between augmenting existing NSEP systems and creating new ones, in order to prevent AT&T from using the waiver as a springboard to become the sole source for all existing and future NSEP communications CPE. The Telephone Companies propose that no new locations be added to the 21 designated NSEP systems from those existing as of July 1, 1984, and no significant increase in line capacity in those systems be allowed.[33] Mountain States argues for stricter limits on augmentation. Under the Mountain States modification, systems would be frozen at their current size and any new procurement would have to be on the open market.[34]

13. FEA and AT&T oppose any restrictions on augmentation. FEA argues that there is no need to limit augmentation since the existing waiver has been used only infrequently and the specified federal agencies are aware that the Commission could withdraw any future waiver if the waiver is abused.[35] Morever, the federal procurement regulations already require special justification, not related to or provided by the Commission waiver, for sole source procurement.[36] AT&T notes that the government decides its own needs and chooses its own suppliers. Because it is impossible for AT&T to abuse the waiver by providing the government with equipment it does not want, AT&T argues that there is no need to limit the size of NSEP systems.[37] Finally, FEA suggests that freezing the size of NSEP systems ignores the reality of operational communications needs and could lead to the fragmentation of systems.[38]

14. The supporters of Option III claim that it would encourage competition by removing AT&T as the single point of contact. Rolm argues that the option would tend to irradicate the present closed procurement atmosphere,[39] while ASC suggests it would bolster competition by adhering to the separations requirements of the Computer II Rules.[40] It is also suggested that this option would meet the legitimate security needs of the federal government by providing a single contact point for NSEP,[41] especially since there has been no showing that only

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[33] Telephone Companies Direct Comments at 4.

[34] Mountain States Direct Comments at 4.

[35] FEA Reply Comments at 13.

[36] *Id.* at 14.

[37] AT&T Reply Comments at 6-7.

[38] FEA Reply Comments at 14.

[39] Rolm Reply Comments at 3.

[40] ASC Direct Comments at 2.

[41] *Id.*

AT&T and the BOCs can adequately provide NSEP.[42]

15. The parties supporting Option III also propose that an organization other than Bellcore become the new NSEP single point of contact for DoD and the other specified federal agencies. GTE proposes, and ASC and Rolm agree, that the National Coordinating Center (NCC) replace Bellcore as the single point of contact.[43] NCC is favored because it was specifically created to respond to NSEP telecommunications requirements, and because it was never part of the Bell System.[44]

16. Option III is strongly opposed by several of the commenting parties. The opponents focus on potential problems with coordination of NSEP communications activities by an entity (NCC or Bellcore) that would have no prior experience in handling the responsibilities it would be required to assume.[45] FEA argues that the new entity might have substantial difficulties creating the new capabilities it would need to provide adequate end-to-end service for the designated NSEP systems, and that this process would be wasteful because similar capabilities which exist in AT&T would be allowed to deteriorate.[46] AT&T comments that the adoption of this option, in addition to creating operational problems, could lead to significant anti-competitive impacts. AT&T argues that under Option III the government, to obtain its NSEP requirements, would have to deal with a single entity representing the entire telecommunications industry, and this would require collaboration among competitors with anti-competitive implications.[47]

17. There are specific concerns about the two organizations, Bellcore and NCC, proposed as the coordinating entity. AT&T notes that the BOCs are prevented by the AT&T divestiture from providing interexchange service,[48] and since Bellcore is owned by the BOCs, its provision of end-to-end NSEP communications might violate the Modification of Final Judgment.[49] FEA, directing its comments toward NCC, indicates that NCC was not created to be a provisioning organization for end-to-end NSEP service. Its planned role was to be a vehicle by which the federal government would seek to facilitate a cooperative and coordinated

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[42] GTE Direct Comments at 5-6.

[43] GTE Direct Comments at 7; ASC Direct Comments at 2; Rolm Reply Comments at 3.

[44] GTE Direct Comments at 7; ASC Direct Comments at 2.

[45] FEA Direct Comments at 5; Mountain States Direct Comments at 3; Ameritech Direct Comments at 4.

[46] FEA Direct Comments at 9; AT&T Direct Comments at 10.

[47] AT&T Direct Comments at 10-11.

[48] Modification of Final Judgment in *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

[49] AT&T Direct Comments at 10.

multiple supplier response to NSEP telecommunications requirements.[50] FEA also indicates that GTE was not entirely straightforward in its proposal of NCC as the provisioning organization. In discussions surrounding the creation of NCC, GTE argued that the NCC Charter limits NCC involvement to existing emergencies.[51] FEA notes that GTE specifically objected to an NCC role assisting in the initiation and coordination of NSEP communications services — an area where GTE now argues NCC should take the central role.[52]

18. Option II is not supported by any party, although FEA indicates it would be acceptable if the Commission should not choose Option I.[53] Much of the opposition is predicated on the option's predicted anti-competitive effects. These effects are presumed by the commenting parties to be similar to those they foresee for Option I because AT&T-C would remain the single point of contact for the 21 designated NSEP systems.[54] Parties also argue that Option II would create competitive problems in excess of those noted for Option I because it would exclude the BOCs from the waiver[55] and because AT&T-C would not be required to inform DoD and the other specified federal agencies of alternative sources for NSEP equipment and services.[56] Finally, AT&T argues that Option II is unacceptable because it would unnecessarily fragment the CPE serving the federal government, thereby increasing AT&T's costs by requiring AT&T-C and AT&T-IS each to support the provision of identical government CPE.[57]

19. No party supports Option IV and nearly all of the commenting parties oppose it. The parties see in this option all of the faults of the other three options and none of the virtues. AT&T-IS is perceived as incapable of quickly developing the needed coordinating mechanism,[58] competition would be reduced by excluding the BOCs as suppliers and by not requiring AT&T-IS to notify the agencies of alternative sources of NSEP services,[59] and an institutional bias in favor of AT&T and AT&T-IS would be created.[60] Moreover, AT&T indicates that the resale of services is not flexible enough to meet all NSEP needs, and since system design is often the key to NSEP requirements, AT&T-IS does not have sufficient

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[50] FEA Reply Comments at 6-7.

[51] *Id.* at 11-12.

[52] *Id.*

[53] FEA Direct Comments at 8.

[54] Central Direct Comments at 2; ASC Direct Comments at 2; Rolm Reply Comments at 2-3.

[55] Ameritech Direct Comments at 3; Telephone Companies Direct Comments at 6-7.

[56] *Id.*; Mountain States Direct Comments at 3.

[57] AT&T Direct Comments at 9.

[58] FEA Direct Comments at 10.

[59] Ameritech Direct Comments at 3; Mountain States Direct Comments at 3.

[60] Telephone Companies Direct Comments at 6-7; ASC Direct Comments at 2.

experience to oversee NSEP servicing on an end-to-end basis.[61]

IV. Discussion

20. In the *Second Notice* we presented four options for the provision of NSEP communications. Our evaluation of these options centers on two policy considerations: the impacts of the options on national security and their impacts on competition in the NSEP telecommunications market. As we discuss below, we must reconcile the conflicts between these two considerations without unduly compromising the objectives underlying each of them.

21. The primary national security consideration for an NSEP provisioning framework is ensuring that the 21 designated NSEP systems are adequately maintained and managed. Two conditions are critical to the continued viability of these systems.[62] First, DoD and the other specified federal agencies must have a single point of contact within the telecommunications industry capable of providing end-to-end services for these systems. And, second, the organization which provides this service must have the demonstrated capacity to do so. FEA suggests this latter condition requires that the organization which has provided such services over time continue to do so.[63] The Commission is convinced that both of these requirements are important to ensuring the viability of the designated NSEP systems and hence to protecting national security.[64] We are well aware of the technical complexity of these systems and the logistical problems which such complexity entails. We are also aware that DoD and the other specified federal agencies are not prepared to operate and maintain these systems. Nor is it clear that any entity which is not itself a telecommunications provider is capable of providing the needed technical and coordinating skills. We are convinced that the public interest in preserving our national security is best served by allowing various entities in the telecommunications industry which have provided end-to-end service to continue to be able to do so.

22. The second consideration which we must take into account is the promotion of competition in the provision of NSEP equipment and services. Over the past decade, in several proceedings, the Commission has taken action to create viable competition in the provision of telecommunications equipment and services.[65] We have found that in most areas

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[61] AT&T Direct Comments at 12.

[62] FEA Direct Comments, appendix at 7-8.

[63] *Id.*

[64] *See* para. 27, *infra.*

[65] *See, e.g., Second Computer Inquiry; Competitive Carrier Rulemaking,* 91 FCC 2d 59 (1982), *recon.* 93 FCC 2d 54 (1983); *Domestic Fixed-Satellite Transponder Sales,* 90 FCC 2d 1238 (1982), *aff'd sub nom. Wold Communications v. FCC,* D.C. Cir. No. 82-2054 (June 1, 1984); *Domestic Communications Satellite Facilities,* 35 FCC 2d 844

the forces of competition will provide the most efficient and effective regulation.[66]

23. We recognize, however, that in the NSEP communications area it is very difficult to create a fully competitive environment while at the same time avoiding unacceptable national security risks. This conflict is in part a consequence of the requirement, noted above, that DoD and the other specified federal agencies have a single point of contact within the telecommunications industry for NSEP communications services and equipment. A single point of contact presents problems for competition with regard to the provision of CPE because the entity which has been chosen by DoD or another specified federal agency as a "general contractor" for an NSEP system will have an incentive to furnish its own equipment to the exclusion of those from other suppliers.[67] Thus, there is a potential risk that NSEP systems will tend to become locked in to the company which is chosen as general contractor. This competitive problem is magnified by the fact that a substantial majority of NSEP systems are currently managed by AT&T.[68] AT&T's management of these systems has allowed it to assume an extensive role in the provision of NSEP communications services and equipment, and a continuation of its management role for the designated systems could tend to extend AT&T's central position regarding NSEP communications.

24. As a consequence of the continuing organizational and management needs of the 21 NSEP systems, we must now make a decision which balances considerations of national security against the competitive principles we have implemented and supported for many years. In this proceeding, the comments and our own analysis have convinced us that there is no practicable means to reconcile fully the conflicting demands of both policies. Thus, we have concluded that to the extent that both policies cannot be fully realized, the concerns of national security must receive the higher priority. This is especially the case because we have concluded that the requirements of national security are more at risk in this proceeding than those of competition.[69] The 21 designated systems, although worth

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(1972); *Specialized Common Carrier Services*, 29 FCC 2d 870 (1971), *aff'd sub nom. Washington Utils. & Transp. Comm'n v. FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975).

[66] *See CPE Detariffing Order*, 95 FCC 2d at 1280.

[67] This tendency is suppressed by certain conditions established in this Order. *See* paras. 30-32, *infra*.

[68] All of the 21 designated NSEP systems are managed by AT&T. AT&T also manages more than 35 others not covered by this Order. No other commenting party has indicated that it is involved in more than one or two NSEP systems. *See* ASC Direct Comments at 1; GTE Direct Comments at 8.

[69] As has been noted in several proceedings, competition is not an end in itself, but is merely one means of serving the public interest as is required by Section 1 of the

several hundred million dollars, represent only a tiny fraction of the overall communications market.[70] Yet, at the same time these are communications networks which are at the heart of some of the Nation's most crucial defense and emergency preparedness systems.[71] Thus, the nature of our policy decision in this Order could have serious repercussions for the national defense, but would be unlikely to have more than a peripheral impact on overall competition in the provision of communications equipment and services.

25. Accordingly, we select the Option I waiver as the best means of ensuring the continued viability of the 21 designated NSEP systems, while at the same time preserving to the greatest extent possible the pro-competitive aspects of our Computer II Rules. The Option I waiver is the best means of preserving the existing organizational capabilities for the end-to-end maintenance and provisioning of the 21 designated NSEP systems and for the provision of communications equipment in emergency situations. We also select this waiver because in the long run, and with the restrictions we will place on it, it will be the framework which is most favorable to competition.

26. In adopting Option I we are creating a permanent waiver of the Computer II Rules which will permit AT&T-C and the regulated BOC entities to maintain end-to-end responsibility for NSEP communications in cases of Presidentially declared and other emergencies[72] and on a continuous basis for the designated NSEP systems. The Commission, although creating a permanent waiver, reserves the right to reevaluate the waiver should conditions warrant. Under this waiver AT&T-C and the regulated BOC entities will be permitted to be responsible for the acquisition of limited amounts of new CPE to replace embedded CPE in the designated systems and for the reasonable augmentation of these systems.[73] AT&T-C and the BOCs will also be permitted to be responsible for the acquisition of unlimited amounts of CPE to carry out requested functions during Presidentially declared and other emergencies.[74] New CPE which is not needed to augment or replace embedded CPE for the 21

Communications Act of 1934, 47 U.S.C. §151. *See FCC v. RCA Communications, Inc.*, 346 U.S. 86, 92 (1953); *Hawaiian Tel. Co. v. FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974).

[70] The original waiver granted to AT&T was for 56 systems, *see CPE Waiver Order* at para. 3, but this was later limited to the 21 designated NSEP systems. *See Bureau Waiver Order* at paras. 2, 3, 13.

[71] For a description of these systems, see Appendix B.

[72] Those emergencies specified in Defense Communications Agency Circular 310-130-1, Ch. II, para. 2 (Feb. 1982). *See CPE Waiver Order* at para. 7 n.6.

[73] For rules on augmentation, see para. 30, *infra*.

[74] By "requested functions" we mean those functions which result from a specific request from DoD or another specified federal agency for AT&T-C or a regulated BOC entity to carry out some mission relating to Presidentially declared or other emergencies.

designated systems, or for a requested mission during a Presidentially declared or other emergency, will not be covered by this waiver.

27. As we noted previously, the primary reason for this waiver is to maintain the integrity of the 21 designated NSEP systems. At the present time, AT&T-C has the existing personnel and expertise to maintain these systems, expertise that can only be gained from long experience with the unique aspects of each installation. An organization which lacked this experience (such as Bellcore, NCC, or AT&T-IS) would take considerable time to develop it after assuming the role of system manager. In the interim these systems, which are crucial to the national defense, would be maintained by an entity which is not fully capable of providing the needed service. We have concluded that there are unacceptable risks involved in permitting an inexperienced and ill-prepared organization to serve as system manager for critical defense communications systems. It is the existence of this expertise and experience in AT&T-C, and the difficulty in obtaining it elsewhere, which in part have led us to select Option I and to reject Options III and IV as unacceptably risky from the standpoint of national security. Moreover, if a new entity were selected it would be acquiring the needed expertise while an equivalent capability in AT&T-C would be allowed to deteriorate. To eliminate this waste of resources, and to prevent potentially dangerous lapses in the proper functioning of these systems, AT&T-C will be permitted to continue to fulfill a responsibility it has performed for many years.

28. Although Option I may not be the best means for creating a completely competitive environment for the provision of NSEP equipment, of the available options it is the one which will have the least long-time negative impact on competition in the communications industry and is the alternative that, as conditioned, will best promote competitive goals. First, its impact on competition for the overall provision of CPE will be minimal since the waiver of the Computer II Rules established in this Order is strictly limited to the designated systems and to certain emergency situations. Second, by allowing the BOCs to provide CPE and associated services for the designated systems we are creating additional competition to AT&T for these 21 systems that would not otherwise exist.[75] None of the other options outlined in the *Second Notice* contained this competitive factor. Finally, government procurement regulations control the acquisition of equipment for the designated systems, and those regulations place strict limitations on what DoD and the other

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[75] For a description of the BOC waiver see para. 26, *supra.*

specified federal agencies can and cannot do.[76] These existing regulations will help promote competition in the NSEP procurement process.

29. Each of the alternative options has significant drawbacks compared with Option I. Options II and IV, although limited in scope, do not provide for additional competition to AT&T from the BOCs. In addition, Option II would require a broader waiver than the one we are mandating here because it would allow AT&T-C to own as well as manage the embedded CPE for these systems.[77] Finally, Option III could present a threat to overall competition in the industry. Option III would create an industry-wide point of contact for NSEP equipment provisioning (in Bellcore, NCC, or some other entity) and would require all companies in the industry to cooperate regarding NSEP communications needs. Allowing such cooperation in a single forum could provide a ready mechanism for the formulation and imposition of various exclusionary and other anticompetitive practices. Thus, from an industry-wide perspective[78] we perceive the Option III approach as providing unnecessary dangers to competition in the overall provision of telecommunications equipment and services.

30. The NSEP communications equipment provisioning framework outlined above, as well as being inherently limited in its impact on overall telecommunications competition, is flexible enough to allow certain procompetitive aspects to be included in the framework. In describing the waiver we noted it is limited to certain emergencies, to replacing embedded CPE, and for the reasonable augmentation of existing systems.[79] We chose to impose this "reasonableness" limitation on augmentation as a means of promoting competition by preventing AT&T from creating entirely new systems under the auspices of our limited waiver. Although some commenting parties suggested we strictly limit the size of NSEP systems, we have rejected this approach because it would be too inflexible to meet the requirements of national security. We are convinced that the augmentation limitation is sufficiently flexible to protect national security, but not so broad as to allow entirely new systems to be "augmented" onto systems covered by the waiver. We also note that the

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[76] *See* Federal Acquisition Regulation, 48 C.F.R. §§ 14.103-1(a), 34.005-1; *see also* Public Law 98-72, 97 Stat. 403 (Aug. 11, 1983); Office of Federal Procurement Policy, Policy Letter No. 84-2, "Non-Competitive Procurement Procedures," 49 Fed. Reg. 8315 (1984).

[77] Also, AT&T suggests this option would cause duplication of facilities resulting in economic inefficiency, an outcome the Commission wishes to avoid. See para. 18, *supra.*

[78] Viewed from a single-company perspective this option might seem to enhance competition since it would reduce AT&T's ability to dominate the the provision of NSEP communications services and equipment. However, viewing the industry as a whole, the idea of creating forums where competitors learn to cooperate is not a pro-competitive policy choice.

[79] *See* para. 26, *supra.*

reporting requirements we impose in this Order will assist the Commission in identifying and eliminating any abuses of the limitation.[80]

31. A further pro-competitive aspect of the waiver we are creating is the requirement that AT&T-C and the BOCs must inform DoD and the other specified federal agencies of alternative CPE suppliers should there be a need for additional CPE. In any case in which AT&T-C or a BOC is authorized by the waiver to be responsible for the acquisition of new CPE, and service required by DoD or another specified federal agency cannot be provided with CPE from the embedded base, AT&T-C or the BOC will be required to notify the affected government agency. AT&T-C or the BOC will specify the CPE which is unavailable and will identify one or more suppliers, at least one of which must not be affiliated with the BOC or AT&T-C.[81] The affected government agency will then determine from which supplier AT&T-C or the BOC will obtain the new CPE in question, and will advise AT&T-C or the BOC, which will then obtain the CPE and be responsible for it as part of end-to-end service to the federal government. If AT&T-C or the BOC is unable to specify an unaffiliated vendor it must so certify to the affected agency and to this Commission. This requirement, which mandates that alternative suppliers be identified, will allow DoD and the other specified federal agencies to select their own equipment suppliers and should reduce any anti-competitive effect of having AT&T-C, a BOC, or some other company as the general contractor.

32. The final action we take in this Order to protect competition in the NSEP marketplace is to impose upon AT&T-C and the regulated BOC entities a quarterly reporting requirement.[82] We impose this requirement to ensure that AT&T-C and the BOCs do not abuse the waiver we are granting, and we note once again that we have reserved the right to review this waiver should the conditions warrant. We do not require pre-approval for use of this waiver, since such a requirement would unnecessarily burden this Commission, AT&T-C, and the BOCs. It would also reduce flexibility in the case of an emergency.

33. There are some final points in regard to the waiver which must be addressed. First, AT&T-C or any BOC operating under the waiver will be required to bill any maintenance of service charges for CPE to DoD or a specified federal agency in accordance with any applicable tariffs. These expenses should not find their way, in any form, into the rate base where ratepaying customers would become responsible. Second, to protect the ratepayers further, AT&T-C and the regulated BOC entities will be

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[80] *See* paras. 31-32, *infra.*

[81] Nothing in this Order is intended to limit the government agencies to those suppliers identified by AT&T-C or a BOC. The agencies remain free to choose any CPE suppliers who can meet their CPE needs.

[82] *See* para. 36, *infra,* on the type of reports will be required.

allowed to act as general contractors for the specified NSEP systems and in cases of Presidentially declared and other emergencies, but will not be able to take title to any new CPE. New CPE will be titled in the affected government agency, AT&T-IS, or a BOC unregulated subsidiary. Any expenses incurred by AT&T-C or a BOC in connection with making the needed procurement arrangements shall not be allocated to any service or facility other than the NSEP service or facility with which the expense is associated.

34. Finally, in regard to detariffing of embedded CPE which was approved on an interim basis in the *Bureau Waiver Order*, we now make such detariffing final. Embedded CPE currently owned by AT&T and used for NSEP communications functions shall be detariffed and transferred to AT&T-IS. The transfer will be in accordance with the terms of the *CPE Detariffing Order*. The transition period will be retroactive to the time AT&T first offered the equipment for sale,[83] and any price increases will occur at the intervals we have specified in previous decisions.[84] The NSEP CPE will be aggregated with other multi-line CPE for the purposes of the net book value limitations.

35. We shall require the policies, rules, and requirements established in this Order to take effect on January 1, 1985. We recognize that the Administrative Procedure Act (APA) requires the effective date of rules to occur at least 30 days following publication in the *Federal Register*, "except . . . as otherwise provided by the agency for good cause found and published with the rule." 5 U.S.C. § 553(d). To the extent that this provision of the APA may be applicable to this Order, we hereby find good cause for an earlier effective date to exist because of the need for these policies, rules, and requirements to be in place by January 1, 1985. Such an early effective date is essential to the continued effective and efficient operation of the 21 designated NSEP systems, and hence to the national security.

V. Ordering Clauses

36. IT IS THEREFORE ORDERED, pursuant to Sections 4(i) and (j), 201-205, 213, 218, 220, and 403 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 154(j), 201-205, 213, 218, 220, and 403, That the waiver, policies, and requirements set forth herein ARE ADOPTED, effective January 1, 1985.

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[83] In its comments AT&T noted that it had treated equipment from the 21 designated systems as detariffed on January 1, 1984. AT&T Direct Comments at 7-8. In this Order we support AT&T's actions, except to the extent that what we have said in this Order is different from the *CPE Detariffing Order*.

[84] *See* CC Docket No. 81-893, Second Report and Order, FCC No. 84-269, 49 Fed. Reg. 27754 (released June 29, 1984); CC Docket No. 81-893, Order, FCC No. 84-304, 49 Fed. Reg. 30710 (released June 29, 1984).

37. IT IS FURTHER ORDERED, That the American Telephone and Telegraph Company and any Bell Operating Company using this waiver shall provide quarterly reports to the Chief, Common Carrier Bureau, on the types and quantities of new customer premises equipment provided by AT&T Communications and the BOCs pursuant to this waiver. These reports shall indicate whether the new CPE was acquired to replace embedded equipment, to augment an existing system, or as part of a requested mission during a Presidentially declared or other emergency. These reports shall be filed no later than 30 days after the close of each calendar quarter, beginning with the quarter ending March 31, 1985.

38. IT IS FURTHER ORDERED, That AT&T or a BOC shall notify the Chief, Common Carrier Bureau, in writing on any occasion when the waiver is used and an unaffiliated alternative supplier cannot be named. Such notification shall include the specifications of the equipment for which an unaffiliated supplier could not be located.

39. IT IS FURTHER ORDERED, That the motion for leave to file late comments filed by The Telephone Companies IS GRANTED.

40. IT IS FURTHER ORDERED, That the inclusion of a missing page in an original filed by the Federal Executive Agencies IS ACCEPTED, as requested by the Federal Executive Agencies.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendix A

Designated NSEP Systems:

Automatic Secure Voice Communications Network (AUTOSEVOCOM)
Joint Chiefs of Staff Alerting Network (JCSAN)
Minuteman
SAC Primary Alerting System (PAS)
SAC Operations Conference System (SOCS)
SAC Command Post Command and Control Consoles (Turrets)
NORAD Alerting System (NAS)
TAC Command and Control Alerting System (TACCALS)
TAC Force Control Management System (TACNET)
Military Airlift Command Operational Phone System (MACOPS)
Air Force Digital Graphics System (AFDIGS)
Air Force Command Post Alerting Network (COPAN)
Air Force Command Post Record Capability (COPREC)
White House Communications Agency Transportable Electric Consoles (TECs)
White House Communications Agency Echo Fox Radio System
U.S. National Airspace System
FEMA (classified system)
Emergency Broadcast System
FEMA National Voice System (FNAVS)

FEMA National Warning System (NAWAS)
Nuclear Regulatory Commission Emergency Notification System (ENS)

Appendix B

Critical National Security and Emergency Preparedness Systems/Circuits Requiring End-to-End Provisioning, including CPE, by AT&T Long Lines

Department of Defense:

A. *Automatic Secure Voice Communications Network (AUTOSEVOCOM):*

AUTOSEVOCOM, utilizing the AUTOVON network, provides a secure voice network for the purpose of exchanging information of any security classification. This system consists of both manual and automatic switched voice networks which have been linked together to form a single system. It is designed to provide users with a means for exchanging classified information over circuitry which has been cryptographically secured.

B. *Joint Chiefs of Staff (JCS):*

1. *Joint Chiefs of Staff Alerting Network (JCSAN):*

This is the primary non-secure voice alerting system of the Joint Chiefs of Staff. It connects the National Military Command Center with the command centers of the Unified and Specified commands throughout the world via direct lines which permit instantaneous and reliable connectivity for critical command and control of U.S. forces. It is the means for dissemination of Emergency Action Messages to the CINCs.

2. *Minuteman:*

This interstate VHF mobile radio system provides continuous command and control voice connectivity between and among key DoD command and control personnel, and between DoD and other Government agencies personnel. It extends the National Military Command and Control System from land line switchboards via radio to key Government personnel anywhere in the Washington Metro area, and ensures continuous connectivity while personnel are in transit.

C. *Strategic Air Command (SAC):*

1. *SAC Primary Alerting System (PAS):*

PAS is the Commander in Chief (CINC) SAC's primary voice communications system. It links Headquarters SAC, the Numbered Air Forces, SAC Unit Command Posts, Air National Guard Bases, Dispersal Bases, Missile launch control centers, Giant Talk HF sites, and Super Low Frequency Communications System sites. It includes CPE at such sites, dedicated leased circuits between the sites, and it is used to increase alert force readiness, direct the positive control launch of alert aircraft, and relay National Command Authority execution directives.

2. *SAC Operations Conference System (SOCS):*

SOCS is CINCSAC's backup to the PAS, and in addition provides voice command and control capability for conferencing for aircraft emergencies, potential missile hazards, and air to ground phone patches through unit command posts for airborne aircraft experiencing difficulties.

3. *SAC Command Post Command and Control Consoles (Turrets):*

The Main Operating Base turret (Command Post Console) is the termination interface between the PAS, SOCS, and the individual base command and control systems (klaxons, the tactical air-crew alerting network, the interbase radio system, etc.) to alert air crews and aircraft. While the MOB turrets are currently provided under contracts with the BOCs, the pre-divestiture AT&T corporate structure ensured the effective integration of this CPE into SAC's command and control communications capability. For example, AT&T maintained configuration control over the consoles thereby ensuring the required uniformity at each of the 30 Command Post locations. With the impending divestiture of the BOCs and AT&T into separate, unaffiliated companies, SAC believes it imperative to integrate the MOB consoles with the transmission network provided by AT&T Long Lines.

D. *NORAD Alerting System (NAS):*

The NAS is the primary means for the Commander-in-Chief (CINC) NORAD to command and control his units. It is a voice network but is being upgraded by AT&T Long Lines by the addition of computer control to monitor line status, perform roll calls and restore circuits. Provision of the entire system by Long Lines is a firm operational requirement to ensure the NAS system meets 99.9 percent availability criteria because the computer control will be distributed throughout the network and the terminal equipments. In addition, separation of such a system into CPE and network would create maintenance problems.

E. *Tactical Air Command (TAC):*

1. *TAC Command and Control Alerting System (TACCALS):*

TAC's alerting system provides instantaneous alerting capability from the TAC Command Post to TAC Command Posts of wing level or higher. This system also provides instantaneous primary voice communications between the Ninth and Twelfth Air Force Command Posts and their respective subordinate unit command posts and provides TAC with an alternate route to subordinate unit command posts.

2. *TAC Force Control Management System (TACNET):*

This system provides timely digital communications between Headquarters Tactical Air Command, TAC Numbered Air Forces, and TAC contingency support staffs to gather and correlate information necessary to formulate command and control decisions, expedite dissemination of these decisions, receive and disseminate information required to implement these decisions, and report status or problems of implementation.

F. *Military Airlift Command:*

Military Airlift Command Operational Phone System (MACOPS):

MACOPS is a standardized state-of-the-art leased command and control communications console system developed by MAC/AT&T Long Lines which provides responsive voice communications for HQ MAC Command Center, its Numbered Air Forces Operations Centers, and selected subordinate MAC Command Posts to facilitate MAC's ability to carry out its worldwide airlift mission. The MACOPS console package is a unique special assembly designed by Western Electric and the consoles are equipped and can interface with AUTOVON (on/off hook), 2/4 wire private lines, PBX stations, central office access links, UHF/VHF/FM radios, and intercom.

G. *Air Force Digital Graphics System (AFDIGS):*

The AFDIGS is a worldwide system for the distribution of weather maps generated primarily by the Air Force Global Weather Central (AFGWC) at Offutt AFB and the National Weather Service. The system consists of terminal facsimile recorders located at base weather stations and circuits which connect the bases to the network transmit station at the AFGWC. The CONUS and Alaskan portions (164 locations) of the network (facsimile recorders and circuits) are leased entirely from AT&T Long Lines on a 5-year contract issued through DECCO in October 1980. The AFDIGS supports the flying safety of DoD aircraft and the protection of DoD resources and personnel at USAF and US Army bases through advance warning of severe weather. A single manager is vital for the integration, restoration and responsiveness necessary to meet operational needs

H. *Air Force Command Post Alerting Network (COPAN):*

COPAN is an extension of the JCS Alerting Network (JCSAN) providing rapid, reliable voice communications between the Air Force Operations Center (AFOC), it's alternate (AFEOC) and all Major Air Commands for passing critical, time sensitive information, including JCS emergency action messages. This system is now, and has been since its inception, managed by AT&T Long Lines.

I. *Air Force Command Post Record Capability (COPREC):*

COPREC provides the Air Force Operations Center a fast, reliable, secure capability for passing record messages between the Air Force Operations Center, its alternate (AFEOC) and all Major Air Commands. COPREC utilizes COPAN circuitry as it's primary transmission medium. The COPREC system has been managed by AT&T Long Lines since its inception.

J. *White House Communications Agency (WHCA):*

1. *Transportable Electric Consoles (TECs):*

The TECs are presently leased from AT&T Long Lines by the WHCA for utilization during Presidential travel outside the Washington, DC area. Long Lines has been the single-system manager for not only the consoles but also the full-period voice circuits which tie the TECs to the White House from the travel locations throughout the world. Long Lines has also provided the necessary liaison with the TEC developer, Western Electric, for system enhancements and major troubleshooting as required.

2. *Echo Fox Radio System:*

It is comprised of Long Lines circuits connected to Long Lines provided radio transmitter/receiver equipment at mostly Long Lines facilities located at strategic locations throughout the continental United States. This system provides a vital communications link to the Presidential aircraft.

Federal Aviation Administration:

U.S. National Airspace System:

Used to control both military and civil aircraft, the telecommunications framework of this system is a complex arrangement of leased systems and circuits supporting the three major Air Traffic Control subsystems, Enroute, Terminal, and Flight Service. The 20 air route traffic control centers (ARTCC) and terminals control all military and civil aircraft at approximately 420 airports in CONUS, Alaska, Hawaii, Puerto Rico and Guam. The flight service system provides pre-flight and in-flight services to predominately general aviation pilots at more than 300 facilities. These three ATC subsystems are supported by AT&T/BOC specially designed and/or specially modified CPE to meet FAA's unique requirements. While most of the CPE is currently provided under contracts with the BOCs, the pre-divestiture AT&T corporate structure ensured the effective integration of this CPE into FAA's ATC communications capability. Because the CPE on these systems are today connected by approximately 17,000 circuits, the majority of which are and will continue to be provided by Long Lines, because of the critical nature of these services to the continuity of the air transportation system, and because of the frequent need for expedited rearrangements or implementation on an end-to-end basis, FAA believes transfer of the "embedded" CPE to Long Lines is the only effective means to retain the required single-system management capability that currently exists.

Federal Emergency Management Agency (FEMA):

1. A classified, special purpose, FEMA system provided under the U.S. Government portion of AT&T Tariff FCC No. 260, and pursuant to contract No. DA-49-068-SC190. Information regarding the purpose of this system, where it is located and how it is interconnected are classified and can be provided under separate cover only to properly cleared personnel.

2. *Emergency Broadcast System:*

It provides the President of the United States with an expeditious method of communicating with the American public in the event of war, threat of war, or grave national crisis. It can also be used during day-to-day emergencies at the State and local levels to provide the means for prompt, reliable receipt and release of life and property-saving warning as well as emergency information.

3. *FEMA National Voice System (FNAVS):*

It is a dedicated leased voice system providing point-to-point communications between the FEMA regional office and the associated state emergency services office (Civil Defense). While the "embedded" CPE is currently provided under a contract with a local telco, AT&T functions as the single system manager.

4. *FEMA National Warning System (NAWAS):*

The primary purpose of the NAWAS is to provide information of an impending attack on the United States. It is also used extensively in natural disasters, weather and sea wave warning. This information is furnished to state governments, cities, counties and various Federal Agencies. These points disseminate the warning to the population by the various local warning systems, Emergency Broadcast System, sirens, and public service radio. The NAWAS is a leased (including maintenance), dedicated, non-secure voice network and has two basic configurations; the warning circuit and the control circuit and it is in continuous operation. The warning circuits are connected to approximately 2,400 terminals throughout the United States. Approximately 1,600 of these are monitored at all times.

Nuclear Regulatory Commission (NRC):

Emergency Notification System (ENS):

The ENS is the designated system to provide the capabilities required by NRC licensees and the NRC to exchange critical information concerning potential and actual nuclear emergencies. Full period, dedicated voice circuits connect each plant control room and emergency response facility to the NRC Operations Center, and the ENS "hotline" is utilized for initial notification to the NRC Operations Center of unusual events, alerts, site area emergencies followed by continuous communications during abnormal operating conditions.

AM Station, Operating Hours
Daytime Station
Operation, Hours of Daytime-Only
Post-Sunset Operation
Sunset

Section 73.99 of the Commission's Rules amended to adjust the power Class III daytime-only AM stations are able to use during post-sunset operation. Proceeding terminated.
—Daytime AM B/C Station
BC Docket No. 82-538

FCC 84-591

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
Hours of Operation of Daytime-Only AM Broadcast Stations	BC Docket No. 82-538 RM-3983
Amendment of Section 73.81 of the Commission's Rules (Hours Of Operation of Dominant and Secondary Stations)	Docket No. 18421

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: November 30, 1984; Released: December 4, 1984

BY THE COMMISSION:

1. The Commission has before it for consideration the petitions for reconsideration of the *Memorandum Opinion and Order* in this proceeding[1] 49 Fed. Reg. 17942, April 26, 1984, revising the rules adopted in the *Report and Order*, 48 Fed. Reg. 42999, September 20, 1983, and responsive pleadings. In addition, the Association for Broadcast Engineering Standards ("ABES") and the Daytime Broadcasters Association

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[1] Petitions for reconsideration have been filed by the Association for Broadcast Engineering Standards; KCPX, Inc.; Summit Radio Corp.; The Henry Radio Company, and Harte-Hanks Radio, Inc.

("DBA") have filed a Joint Motion for Final Orders and Termination of Proceeding. If accepted by the Commission, the joint motion offers a basis for resolving all of the outstanding issues in this proceeding.

2. The subject proceeding began with a combined *Notice of Proposed Rule Making and Notice of Inquiry* designed to explore possible steps which could be taken to alleviate the difficulties faced by daytime-only stations which arise as a consequence of their being licensed to operate only between local sunrise and local sunset. The *Inquiry* portion of the proceeding included a wide variety of issues, which have been resolved by the *Report and Order* or are to be considered elsewhere. The main focus of the rule making portion of the proceeding involved the possible authorization of post-sunset operation.[2]

3. Based on the record developed in this proceeding, the Commission adopted a *Report and Order* amending the rules to permit post-sunset operation. Class III daytime-only stations (those on regional channels) were permitted to operate two hours beyond local sunset with a maximum power of 500 watts, reduced as necessary to avoid interference. Most Class II daytime-only stations (those on clear channels) also were permitted to operate past local sunset with a maximum power of 500 watts. However, the specific power and period of operation for Class II stations varied depending on applicable interference protection requirements.

4. Although DBA supported the Commission's decision to authorize post-sunset operation, it nonetheless sought reconsideration of the Commission decision to limit the power Class III stations could use in order to avoid interference. According to DBA, the new rules were excessively technical and imposed excessive restrictions on these stations.[3] Instead of using the "worst-case" approach,[4] DBA suggested making periodic recalculations or using an averaging of the calculations made during the post sunset period. ABES and others opposed the petition for reconsideration, arguing that the Commission's original decision made generous provision for the needs of daytime-only stations during the post-sunset period.

5. After the cycle of pleadings on the original petition concluded, DBA received leave and filed a supplement to its petition, to which the other

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[2] Pre-sunrise operation has been authorized by the Commission years earlier. Further rule changes enlarging the opportunities of pre-sunrise operation also were proposed and later adopted in this proceeding. However, these matters are no longer at issue.

[3] DBA also sought changes in provisions regarding post-sunset operation by Class II stations. The matter is no longer before us as there have been no objections to modifications made in the Commission in this regard.

[4] The "worst-case" approach involves making the calculations regarding permissible power at the end of the two-hour post-sunset period when the potential for interference is at its maximum.

parties responded. In this supplement DBA sought authority for all Class III stations to use the full 500 watts power until 6:30 p.m. local time. DBA argued that this would put these Class III stations in the same position as they were during the pre-sunrise period when they are allowed to use 500 watts starting at 6:00 a.m. regardless of interference to co-channel U.S. stations. According to DBA, there was no basis for treating the pre-sunrise and post-sunset periods differently, since their signal propagation conditions are quite similar.

6. The opposition pleadings asserted that the petition, even as suplemented, failed to offer new evidence or even any data whatever to support any modification of the Commission's decision. Moreover, according to these parties, the pre-sunrise experience did not provide a basis for relief in view of the extensive new interference that would result from the proposed post-sunset operations.

7. After review of this additional material, the Commission decided that it would not be possible to provide all of the relief sought by DBA. Even though the Commission agreed that post-sunset operation is important, it found no record evidence on which it could conclude that the substantial interference losses resulting from the post-sunset operations could be ignored, as DBA had urged. Although the Commission concluded that interference considerations did have to be taken into account, it did reexamine the "worst-case" approach under which power for Class III stations had been restricted, based on the potential for interference during the final moment of the two-hour post-sunset period. Although this method did avoid interference, it also meant reducing power more than was necessary during other parts of this two-hour period.

8. Ultimately, the Commission adopted a revision that it believed would lead to substantial increases in power without leading to excessive interference. Under the new method, power for the first hour after sunset was to be calculated at the middle of the hour. Use of the midpoint was intended to balance the excess of protection afforded during the first half of the period by the partial protection afforded during the second half of the period. In order to respond to the special needs these stations have for increased power during the early evening hours, the Commission decided that this increased power could be used until 6:00 p.m. local time, even if that extended beyond the first hour post-sunset. Finally, for some stations, even the new calculation method did not provide a substantial power level. For these stations, the Commission decided that additional relief was warranted, and it permitted them to use a minimum power of 100 watts during the period until 6:00 p.m.

9. ABES and the other parties listed above filed petitions for reconsideration. The thrust of these petitions was that the Commission had erred in revising its position in regard to the power limits for post-sunset

operation by Class III daytime-only stations. According to ABES, the revised rules would permit substantial interference to the continued reception of full-time stations of the sort originally rejected by the Commission. ABES insisted that the only alleged justification for the change was the economic benefit that would accrue to daytime-only stations, but this, it said, ignored the economic loss that would result to full-time stations.[5]

10. The other petitions for reconsideration made similar arguments regarding the expected impact of the revised rules and stressed the impact on their own operations. Various examples of interference were offered, which in one case were alleged to cause the affected station to lose more than 40% of its coverage area, including part of its city of license. Finally, because of the concern over the anticipated effect of the new rules, ABES asked for a stay of the new rules pending resolution of the issues raised on reconsideration.

11. DBA sought an extension of time to permit it to explore with ABES and others the possibility of a settlement. After extensive discussions between DBA and ABES, they filed their joint motion proposing a compromise solution regarding post-sunset powers for Class III daytime-only station. The joint motion included a description of the events leading up to the settlement as well as an attachment which gave examples of the kinds of operations that the compromise would permit.

12. The compromise is designed to offer as much benefit to daytime-only stations as possible during the pre-6:00 p.m. period while minimizing both the amount of interference and its duration. As the joint motion described it,

> "Paramount to the consideration of the parties was the concern that settlement provide a solution that is mutually acceptable, that will maximize service to the public, minimize interference to fulltime stations, and which can be implemented in time for the shortened days of Winter 1984-85."

According to ABES and DBA, the benefits of the compromise can be seen in the engineering exhibits appended to the motion. These are said to show markedly lessened interference as compared to the revised rules, along with powers substantially improved from those originally established, albeit lower than those on reconsideration. However, as the parties recognize, the series of "stepped power reductions" called for under their agreement would require additional analysis by the Commission. Moreover, reliance would have to be placed on a licensee's ability to follow the new more complicated system of power levels being proposed. Nonetheless, the parties believe that the compromise offers a sound basis for resolving the outstanding issues in this proceeding.

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[5] ABES also sought a stay of the new rules, and this was opposed by DBA. However, this occurred before the joint motion was filed. Subsequently, the rule changes were stayed pending consideration of the joint motion.

13. In view of the history of this proceeding, it is all the more important to explore all avenues of resolution even though the compromise before us does involve greater complexity for the licensee and increased administrative burden for the Commission. The impact on the Commission is not an obstacle in itself, as most of this effort has already been expended as part of the time-consuming computer programming effort to determine the overall impact of the compromise. As a consequence, only the lesser aspect of issuing new authorizations remains. Likewise, the multiple power levels to be specified do not cause concern. We belive that the system can be set forth with sufficient clarity so licensees will be able to follow the powers and periods of operation specified.

14. Finally, as to the view taken regarding the compromise itself, we think it important to put the vexing issues involved in this proceeding to rest. As our two earlier decisions made clear, there are compelling reasons which can be advanced to support the needs of both daytime-only and full-time stations. Since it is not desirable to follow either position to the exclusion of the other, some middle ground must be found. The problem has arisen because there is no obviously appropriate point at which to draw the line. Several factors are involved, and each must be balanced as part of an overall decision. Although the Commission could attempt to strike such a balance, it is clearly preferable to follow the industry-wide compromise position if it is fully supported by the record. Our review convinces us that both in policy terms and in engineering particulars, the parties have proposed a sound basis for resolving the conflicting considerations here involved.

15. The terms of the compromise involve the following: (1) For the first 30 minutes following sunset, powers are to be calculated at sunset plus 30 minutes (SS + 0.5); (2) For the next 30 minutes, the power is to be calculated at SS + 1.0; (3) For the next hour, power is to be calculated at SS + 2.0., and (4) where the power specified is less than 100 watts, adjustments in power during the period until 6:00 p.m. are to be made as follows:

Calculated Power	*Adjusted Minimum Power*
From 1 watt to 45 watts	50 watts
Above 45 watts to 70 watts	75 watts
Above 70 watts to 100 watts	100 watts

As a result, all Class III stations would have a power of at least 50 watts during the pre-6:00 p.m. period, and many would have substantially more. Even after 6:00 p.m., the new calculation method will yield substantial powers during the first hour after sunset.

16. The compromise provides full protection to foreign stations as required by treaty, it offers increased power for daytime-only stations and at the same time provides enhanced interference protection for full-time stations. It gives full recognition to the importance of additional power during the period until 6:00 p.m. while reducing the amount of interference by two means. First, the SS + 0.5 calculation is only to be used for the first half hour of post-sunset operation, and the SS + 1.0 calculation is to be used for the second half hour. Second, instead of increasing all powers to 100 watts regardless of interference, the increase is on a sliding scale. Overall our extensive study of the compromise convinces us that it offers a sound public interest basis on which to resolve the outstanding issues. Therefore, we shall adopt the compromise and shall issue the necessary authorizations promptly. Post-sunset operation as specified in these authorizations may commence as soon as the applicable rule changes go into effect. Under the circumstances of this proceeding, there is no reason to wait 30 days following publication of the new rules in the Federal Register before putting them into effect. Delay in the commencement of these operations would serve no useful purpose. All of the parties have joined in supporting this revision of the rules to relieve a current restriction. Accordingly, pursuant to 5 U.S.C. §553(d), the changes can be effected on publication in the Federal Register.

17. Accordingly, IT IS ORDERED, That the subject Joint Motion IS GRANTED and, pursuant to Sections 4(i), 303 and 307(b) of the Communications Act of 1934, as amended, Section 73.99 of the Commission's Rules IS AMENDED effective December 10, 1984, as set forth in the attached appendix.

18. IT IS FURTHER ORDERED, That the above-listed petitions for reconsideration ARE GRANTED to the extent indicated and in all other respects ARE DENIED.

19. IT IS FURTHER ORDERED, That the stay ordered earlier in this proceeding IS DISSOLVED.

20. IT IS FURTHER ORDERED, That this proceeding is terminated.

FEDERAL COMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendix

47 CFR Section 73.99 is amended by revising subparagraph (e)(5) and adding subparagraphs (e)(6) and (e)(7) to read as follows:

§73.99 Pre-Sunrise Service Authorization (PSRA) and Post-Sunset Service Authorization (PSSA).

* * * * *

(e) * * *

(5) Class III daytime-only stations operating PSSA beyond 6:00 p.m. local time are required to fully protect domestic full-time Class III stations.

(6) The protection that Class III daytime-only stations are required to provide when operating PSSA until 6:00 p.m. local time is as follows:

(i) For the first half-hour of PSSA operation, protection will be calculated at sunset plus 30 minutes at the site of the Class III daytime-only station;

(ii) For the second half-hour of PSSA operation, protection will be calculated at sunset plus one hour at the site of the Class III daytime-only station;

(iii) For the second hour of PSSA operation, protection will be calculated at sunset plus two hours at the site of the Class III daytime-only station;

(iv) Minimum powers during the period until 6:00 p.m. local time shall be permitted as follows:

Calculated Power	*Adjusted Minimum Power*
From 1 to 45 watts	**50 watts**
Above 45 to 70 watts	**75 watts**
Above 70 to 100 watts	**100 watts**

(7) For the purposes of determining protection, the existing nighttime RSS limit will be used in the determination of maximum power permissible.

Depreciation Rates

These Orders will prescribe depreciation rates for the telephone companies and accounts/subaccounts shown in Appendices to the Orders.

—Depreciation Rates

FCC 84-620

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

The Prescription of Revised Percentages of Depreciation pursuant to the Communications Act of 1934, as amended, for:

The Chesapeake and Potomac Telephone Company
The Chesapeake and Potomac Telephone Company of Maryland
The Chesapeake and Potomac Telephone Company of Virginia
The Chesapeake and Potomac Telephone Company of West Virginia
Continental Telephone Company of Virginia
General Telephone Company of Florida
General Telephone Company of Indiana
General Telephone Company of Michigan
General Telephone Company of Ohio
Illinois Bell Telephone Company
Indiana Bell Telephone Company, Incorporated
New England Telephone and Telegraph Company
South Central Bell Telephone Company
The Southern New England Telephone Company

ORDER

Adopted: December 10, 1984; Released: December 19, 1984

BY THE COMMISSION:

I. Introduction

1. The Communications Act of 1934, as amended, grants the Commission the authority to prescribe depreciation rates for common carriers and to revise these depreciation rates when it deems necessary. By this order we prescribe revised depreciation rates for the fourteen common carriers listed in the caption using both the vintage group remaining-life (VG) and equal life group remaining-life (ELG) procedures.

II. Background

A. Methods

2. We approved the use of these procedures in our final decision in *Property Depreciation*, Docket No. 20188, 83 FCC 2d 267 (1980), *reconsideration*, 87 FCC 2d 916 (1981). The remaining-life procedures are designed to distribute the unrecovered cost of an account (including any reserve deficit or surplus) over its estimated average remaining life. The equal life group procedure was adopted to allow for depreciation at rates more representative of consumption of capital than the vintage group procedure which had been used exclusively prior to our decision in that docket. In accordance with our decision we implemented rates using these new procedures in all depreciation prescription orders beginning in 1981. This order continues the use of these procedures.

B. Review Procedures

3. Since the late 1940's, the Commission has reviewed and prescribed the depreciation rates of approximately one-third of the larger FCC-subject telephone carriers each year. In most cases we have prescribed rates for a carrier only after the following actions have been completed:

(1) Submittal of depreciation studies by the carrier.

(2) Staff review of the carrier's rate filings and studies in support of its proposed life and salvage factors.

(3) Independent staff analysis of such information as the carrier's plant mortality data and equipment retirement plans.

(4) Preparation of preliminary staff recommendations.

(5) Discussion of the carrier's filings and the preliminary FCC staff proposals at a conference in which representatives of the carrier, the staffs of the respective state commissions, and the FCC staff participate (i.e., a three-way meeting).

4. The fourteen carriers for which rates are under consideration submitted studies proposing new depreciation rates based upon revised life and salvage estimates. These studies were reviewed in detail by our staff, which then prepared its preliminary life, net salvage, and rate proposals and forwarded them to the companies and the state commis-

sions. Some of the state commissions prepared similar studies and recommendations. Three-way meetings were then held at which the life, net salvage, and depreciation rate proposals of all three parties were thoroughly discussed.

5. After completing its analysis and developing its recommendations, our staff issued a Public Notice on September 10, 1984, entitled, "Depreciation Rate Prescriptions Proposed for Domestic Telephone Companies—Notice of Opportunity for Comment." The staff transmitted to each company and state commission a copy of the September 10 Public Notice and schedules showing the proposed depreciation rates.

III. Discussion of Issues

6. Comments were filed by six telephone operating companies, four regional holding companies, ten state regulatory commissions, and three state agencies representing ratepayer interests. A copy of each of these comments and a staff-prepared summary are available for inspection in the Commission's Common Carrier Bureau offices. Many of the issues raised by the commenting parties have been discussed and disposed of in previous orders.[1] Accordingly, in this order we do not address every issue raised by every commenter.

A. Composite Rates and Annual Updates

7. In our 1983 depreciation prescription orders, see, e.g., *Depreciation Rates*, 96 FCC 2d 257 (1983), *reconsideration*, FCC Order 84-505, released October 31, 1984), we ordered the use of composite remaining-life depreciation rates. Composite rates were introduced to avoid the unnecessary complexity that would be introduced in coming years if we continued prescription of separate ELG rates for each new vintage of each account. Although we continue to prefer the use of one composite rate for each account, a number of companies have filed for three separate rates for each account: one of the original cost of the ELG vintages, one for the original cost of the VG vintages, and one for net salvage for the account as a whole. Both compositing procedures, i.e., one and three rates, result substantially in the same depreciation expense level. In spite of our preference for the simplicity of one composite rate, we will prescribe either one or three composite rates as requested. We direct the staff to

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[1] For example, the state commissions of the District of Columbia, Louisiana, Maine, and Michigan continue to object to this Commission's preemption of state authority over depreciation rates. As we have found in prior orders, however, our preemptive authority on depreciation matters is both clear and ample. See *Amendment of Part 31*, 92 F.C.C. 2d 864 (1984), *aff'd Virginia State Corporation Commission v. F.C.C.*, 737 F. 2d 388 (4th Cir. 1984); *South Central Bell Telephone Company v. Louisiana Public Utilities Commission*, No. 83-3495 (5th Cir. October 11, 1984).

continue to monitor this procedure and inform us if further changes or refinements are necessary.

8. In our 1983 prescription orders we also allowed the use of optional annual updates for all accounts to assure that the composite rates would be kept current. These updates are designed to reflect depreciation rate changes necessitated by plant additions and retirements without altering the prescribed service life and net salvage estimates. We believe this practice should be continued to assure that composite rates are kept as up-to-date as possible between triennial depreciation studies.

B. Effective Dates

9. Prior to our decision in Docket No. 20188 depreciation rates were usually prescribed retroactively to the beginning of the year in which they were filed. This appeared to be a reasonable practice because the rates were based on depreciation studies made as of the beginning of the review year. However, the rapid increase in depreciation expenses and the more complex interaction of federal and state regulatory actions have prompted us, in recent years, to allow effective dates for new depreciation rates at any time between January of the filing year and the first month following the release of the prescription order. The companies under consideration have all filed for effective dates consistent with our recent orders (i.e., between January 1, 1984 and January 1, 1985) except for the General Telephone Company of Florida which requested a May 1, 1985 effective date. The issue of effective dates has been considered repeatedly in recent depreciation orders, and General of Florida provides no reasons why we should change our policy on effective dates. The Florida Commission filed no comments on this issue. While we would prefer the effective date of new rates to coincide with the study date, i.e., the beginning of the filing year, the complex interaction of federal and state regulatory actions continues to mandate a flexible approach. Therefore, we shall again grant the effective dates proposed by the companies with the exception of General Telephone Company of Florida, for which we prescribe a January 1, 1985 effective date.

C. Submission of Whole-Life Depreciation Studies

10. In *Property Depreciation*, 83 FCC 2d at 290, we directed the staff to

> . . . keep the Commission fully informed as to the difference in amounts of annual charges involved in any recommendations for prescribed rates that it might make. For at least a period of three years, we require that all rates recommended for prescription carry with them a statement of the dollar impact in terms of annual expense, as between the rates calculated under the whole-life concept. Thereafter, the staff is to advise the Commission as to such differences whenever the proposed remaining-life rates result in an increase in proposed annual charges of 115% or more than the increase in annual charges arrived at by calculating whole-life rates.

11. With our approval of the 1983 prescription orders, we completed the implementation of remaining-life rates for all of the telephone companies for which we prescribe depreciation rates. However, after prescribing remaining-life rates for three years and considering the controversy that has developed regarding the pace at which reserve deficits are being written down,[2] we find that it is more essential than ever that the companies file rates on both a whole-life and remaining-life basis.[3] Inasmuch as the computerized systems which the companies and regulators have in operation can easily determine both whole-life and remaining-life factors, we find that reporting both figures will cost the companies and regulators very little. We, therefore, require the companies to continue to report whole-life rates to the Commission for at least the next three-year prescription cycle.

D. Life and Net Salvage Factors

12. The only accounts in which three-way agreements on life and salvage factors were not reached are:

Company	*Account*
C&P of West Virginia	COE — Step-by-Step
C&P of West Virginia	COE — Crossbar
C&P of West Virginia	COE — Circuit (Other)
C&P of West Virginia	COE — Analog Electronic
General of Florida	COE— Analog Electronic
General of Michigan	COE — Electromechanical

For all these accounts our staff reached agreement with either the company or the state commission staff.

13. For the accounts listed above the West Virginia Commission did not agree to the life and salvage parameters proposed by our staff and the company, and urged us to delay prescription of revised depreciation rates for these accounts until next year. In its comments West Virginia charged that the agreements on life and salvage are inconsistent with the West Virginia staff policy regarding capital construction by telephone utilities and may be inconsistent with an impending West Virginia rulemaking which could impose a construction certification requirement on telephone companies in the state. West Virginia stated that it plans to decide its telephone company construction and certification policy by mid-1985.

14. In deciding whether to delay the prescription of rates for C&P of West Virginia, we considered the life forecasts provided by the parties and the likelihood that these life forecasts will prove to be accurate. During the review process C&P of West Virginia submitted detailed plans which clearly show that significant changes in the prescribed life

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[2] See, e.g., paragraphs 19 and 20 below.

[3] The difference between the remaining-life and whole-life rate is a measure of the rate at which the reserve deficit or surplus is being written down.

estimates are necessary for these accounts. After reviewing and discussing these plans with the Company, our staff agreed that significant increases in rates for these accounts are warranted.[4] The West Virginia Commission argued that its regulatory actions may cause the Company to alter its plans and to revise further its depreciation rate proposals. While we do not dispute that West Virginia can affect the Company's plant construction and retirement activities through the exercise of its regulatory purview, we find it unlikely that the state's actions will cause extreme changes to the Company's plans to replace the plant in question here — especially the investment in the COE-Step-by-Step and COE-Crossbar accounts which are commonly thought to be technologically obsolete. Therefore, we believe the most prudent course is to prescribe the rates recommended by the Company and our staff now and to revise these rates as necessary to reflect the West Virginia Commission's capital construction and certification policies after they are finalized. We, therefore, request that the West Virginia Commission inform our staff of its telephone company construction policy determinations, and that our staff review these findings and determine what changes in C&P of West Virginia's rates it believes are necessary as soon as practicable — regardless of whether such consideration coincides with the Company's regular triennial review. We will then rule on the staff's recommendations and prescribe revised rates as necessary.

15. For General of Florida's COE — Analog Electronic account, our staff and the staff of the Florida Commission recommend a 15 year projection life, while the Company proposes a 12.8 year projection life. General of Florida argued two points in its opposition to our staff's recommendation. First, it contended that the group procedures used by our staff are inconsistent with our decision in Docket No. 20188. Second, it contended that our staff has increased the prescribed life estimate of this account by more than two years. In response to General's first contention, the rates recommended by our staff are based upon vintage group procedures for all investments placed before 1983 and equal life group procedures for all investments placed in 1983 and later. As such, we find the staff's recommendations to be consistent with our decision in Docket No. 20188, which allowed the use of equal life group rates *for new additions only*, and our initial prescription order for equal life group rates for General of Florida's central office equipment accounts (see *Depreciation Rates*, 92 FCC 2d 712 (1982)). In response to General's second contention, we note that our staff's current recommendations are

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[4] Although our staff agreed that significant increases in depreciation rates for these accounts are warranted, it did not agree to rates as high as C&P of West Virginia initially proposed.

for shorter lives than those underlying the currently prescribed rates as illustrated by the following table:

	Currently Prescribed	*Staff Recommendations*
Average Service life	15.1 years	14.5 years
Average Remaining life	12.2	10.3

We find General's contentions to be unpersuasive. Therefore, for General of Florida's COE-Analog Electronic account we adopt the life estimate recommended by our staff and the Florida Commission.

16. For General of Michigan's COE-Electromechanical Switching account, our staff and the Michigan Public Service Commission staff recommend a 1989 average year of final retirement (AYFR), while General of Michigan proposes a slightly lower AYFR. General contends that the AYFR proposed by the commission staffs is inconsistent with its switch replacement schedule. Inasmuch as the Company has not met its retirement schedules in the past,[5] we believe (and the Michigan Commission staff concurs) that further delays are likely in the future. Both our staff and the Michigan Commission staff have recommended a rate for this account which allows for a moderate delay in the Company's retirement schedule and we adopt the staff proposal.

E. Amortization and Dying Accounts

17. In Docket No. 20188 we expressed our concern that depreciation rates be prescribed in a manner that would allow for full capital recovery over the life of the assets. Consistent with this policy, we revised our rules to allow for the use of the remaining-life procedure. In last year's depreciation prescription orders, we identified special situations[6] in which we believe the use of remaining-life procedures would not adequately allow for full and timely capital recovery. For such accounts we ordered the use of amortization procedures in lieu of remaining-life procedures. During the 1984 review our staff identified the following twelve additional accounts for which it has recommended amortization procedures to allow for full and timely capital recovery:

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[5] For example, during the 1981-83 period the Company retired less than half of the electromechanical switching investment that it had scheduled for retirement in its 1981 depreciation study.

[6] For example, see *Depreciation Rates*, 96 FCC 2d 257 (1983), in which we discussed approximately twenty cases in which a plant account's investment was completely retired or was in the dying phase of its life cycle and a substantial reserve imbalance existed.

Company	*Jurisdiction*	*Account*	*Amortization Period*
C&P of West Virginia	West Virginia	COE-Manual	2
New England Telephone	Maine	COE-Manual	2
New England Telephone	New Hampshire	COE-Manual	2
New England Telephone	New Hampshire	COE-Crossbar	2
New England Telephone	Vermont	COE-SXS	3
New England Telephone	Vermont	COE-Crossbar	3
New England Telephone	Vermont	Aerial Wire	3
General of Michigan	Michigan	Aerial Wire	4
Continental of Virginia	Virginia	Analog Microwave	3
Continental of Virginia	Virginia	Aerial Wire	4
Continental of Virginia	Virginia	Furniture - Minor Items	5
Continental of Virginia	Virginia	Vehicles - Minor Items	5

18. The Companies, state commissions, and our staff discussed these accounts at length and recommended that the deficiencies be amortized over the periods shown above. Only one party disagreed with the use of the amortizations described above, the Vermont Department of Public Service (Department).[7] The Department contended that the proposed amortizations in Vermont constitute an acceleration of capital recovery and thus defeat the regulatory goal of rate stability. We have examined the Department's views and find that, although the amortizations do increase depreciation levels over those which would result solely from the use of remaining-life procedures, we cannot agree with the Department's contention that the use of the amortizations will cause a rate stability problem.[8] The Vermont Public Service Board (Board) recently considered the Department's views in a state rate proceeding and rejected them on the basis that, in today's increasingly competitive telecommunications marketplace, continued deferral of capital recovery of reserve deficiencies is not in the interest of either the company or Vermont ratepayers. In light of the Board's determinations, we find that the use of the proposed amortization is consistent with our policy of allowing for full and timely capital recovery. Accordingly, we prescribe the rates and amortization amounts as specified in the Appendix.

F. Amortization of reserve deficits for Illinois Bell

19. Illinois Bell proposes to extend the use of the amortization procedure (in lieu of the remaining-life procedure) to all accounts for which reserve deficiencies are indicated, not just the dying accounts with

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[7] The Vermont Department of Public Service represents ratepayer interests before the Vermont Public Service Board. The Public Service Board alone has the intrastate ratemaking authority for telephone service in Vermont.

[8] The increase in intrastate depreciation expense due to the proposed amortizations in Vermont is approximately $800,000 per year. This amounts to an increase of less than 1% of the nearly $90 million of annual intrastate revenues for New England Telephone in Vermont.

large reserve imbalances.[9] Specifically, Illinois Bell proposes three major changes to our current procedures: (1) to use the ELG method for depreciation of all vintages of plant; (2) to quantify and segregate the reserve deficiency (if any) using ELG concepts for all plant; and (3) to amortize the reserve deficiency over a fixed period of years which is unrelated to the average remaining life of the assets. The first two proposals of Illinois Bell require that ELG concepts be applied to the embedded assets. The company is supported by the Illinois Commerce Commission and most of the telephone companies that submitted comments in response to our Public Notice. In our decision in Docket No. 20188 and in our depreciation prescription orders since 1981,[10] however, we have consistently denied the use of ELG for embedded plant because its proper implementation would require more detailed recordkeeping and increased administrative cost, and its use would unnecessarily complicate current procedures which already allow for full and timely capital recovery. Inasmuch as neither the company nor the commenters have presented any new evidence or arguments in support of the use of ELG for embedded vintages that were not already considered in our prior decisions, we shall not reconsider them here. Accordingly, we reject Illinois' Bell's proposal to use ELG procedures for embedded plant.

20. Illinois Bell proposed to increase depreciation expense through the use of a five-year period[11] for amortization of the reserve deficit in most accounts. It justifies the need for this increase of depreciation expense over the levels produced by the existing remaining-life procedure by citing the increased risk that future competitive conditions will not allow customer prices that support the recovery of reserve deficits. Illinois Bell believes that many of its services, particularly those utilized by its larger customers, will be in a fully competitive environment in the foreseeable future, driving prices to marginal costs and leaving no revenues to cover reserve deficit depreciation through the remaining-life method. It proposes a five-year amortization period to assure that the deficits built up in the past are recovered through reasonable annual depreciation charges

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[9] Indiana Bell has also proposed that rates be prescribed based upon an amortization plan contingent on rate relief by the Indiana Commission. Inasmuch as we have no indication that the state will support this plan, and a proposed effective date has not been specified, we find no need to consider this amortization proposal in this order. In addition to its amortization plan, Indiana Bell has proposed that remaining-life rates be prescribed effective January 1, 1985. These rates have been agreed to by our staff and that of the Indiana Commission, and are shown in the Appendix.

[10] See, e.g., *Depreciation Rates*, 96 FCC 2d 257 (1983), *reconsideration*, FCC Order 84-505, released October 31, 1984.

[11] Illinois Bell's initial proposal was for an eight-year amortization of reserve deficits calculated using ELG concepts. Alternatively, Illinois Bell proposed a five-year amortization employing conventional vintage group procedures in the event ELG for embedded plant was denied.

before competition cuts off its ability to do so. The Attorney General of Illinois, commenting on behalf of Illinois ratepayer interests, opposed the concept of amortization for Illinois Bell because he believes that most of the company's services will remain in monopoly status for the foreseeable future. Thus, he sees no need for the increase in annual depreciation expense to recover reserve deficits proposed by the company,[12] especially when the currently-used remaining-life method will recover deficits over the remaining life of the assets. The Illinois Commerce Commission considered the opinions of the company and the Attorney General of Illinois in a recent rate hearing and supported the position of the company.[13] The Illinois Commission believes that the interests of Illinois Bell ratepayers will be best served if the built-up reserve deficits are eliminated promptly, before the risk of non-recovery that would be coincident with impending competition in many service offerings. We have considered the views of the company, the Illinois Commission, and the Attorney General of Illinois and concur with the state commission that prompt recovery of reserve deficits through a five-year amortization procedure is a reasonable alternative to the remaining-life procedure under the circumstances in this jurisdiction. The Illinois Commission has determined that a five-year amortization produces annual expenses that are not excessive for Illinois Bell or its ratepayers. Finding that a reasonable case has been made for a five-year amortization of reserve deficits in many of Illinois Bell's accounts, and relying on the opinion of the Illinois Commission regarding the competitive situation in Illinois and the burden on its ratepayers[14], we prescribe the depreciation rates and amortizations shown in the Appendix.

21. We believe, along with most of the state commissions, that the remaining-life method is generally adequate to assure full and timely recovery of existing reserve deficits in embedded vintages. Nevertheless, many companies expressed a desire to implement amortizations of reserve deficits in their embedded plant for many of the same reasons given by Illinois Bell. In recognition of the varying competitive and regulatory

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[12] The Attorney General of Illinois also suggested that depreciation recovery should be disaggregated by service so that any increases in depreciation expense are borne by the customers consuming the capital. He fears that monopoly customers will be saddled with a disproportionate share of capital recovery costs if "broad-brush" approaches like amortization are adopted. This issue is really one of rate design and as such is outside the purview of this order. Rate design is largely within the authority of individual state commissions. We require only that the state apply the depreciation rates and amortizations prescribed in this order.

[13] Illinois Commerce Commission's *Second Interim Order in 83-0005*, adopted October 30, 1984.

[14] We trust that the Illinois Commerce Commission will continue to monitor this situation, and advise us as necessary.

situations in each state, we direct our staff to consider the possibility of the use of amortizations similar to that approved herein for Illinois Bell. Upon application by a company with the concurrence of its state commission we will entertain the amortization approach for the elimination of reserve deficits in embedded plant on a case-by-case basis. The opinion of the state regulatory commission will be a significant factor in any decision to allow the use of amortizations, as it has been in the case of Illinois Bell. Furthermore, we direct the staff to study this alternative to the remaining-life method and to propose necessary guidelines and accounting and reporting procedures as it deems necessary.

G. Conclusion

22. Having considered the proposals of the companies, the positions set forth by the companies and state commissions at the three-way meetings, the responses to the staff's review letters and Public Notice, and the recommendations of the staff, we adopt the depreciation rates and amortizations listed in the Appendix.

IV. Ordering Clauses

23. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 201-205 and 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§151, 154(i), 201-205 and 220(b), That the percentages of depreciation and amortizations set forth in the Appendix to this order are prescribed effective on the dates listed.

24. IT IS FURTHER ORDERED, That the companies shall submit to the Commission whole-life as well as remaining-life depreciation studies during the next represcription period.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for The Chesapeake and Potomac Telephone Company
Effective January 1, 1985#

Account No.	*Class or Subclass of Plant*	*VG Rate* (%)	*ELG Rate* (%)	*Net Salvage Rate* (%)	*First ELG Year*
212	Buildings	2.4	4.0	–0.2	1984
221	Central Office Equipment				
	Manual	5.5	–	0.0	
	Crossbar	11.0	–	0.5	
	Non-Ded. Circuit	4.9	16.4	0.2	1983
	DDS Circuit	6.8	12.9	0.2	1983
	Radio	1.1	8.5	0.6	1983
	Analog Electronic	7.5	9.2	–0.5	1983
	Digital Electronic	5.0	8.6	0.0	1983
231	Station Apparatus				
	Teletypewriter	7.1	–	0.1	
	Telephone & Miscellaneous	10.2	–	–1.1	
	Radio	5.1	–	–5.7	
232	Station Connections - Other	5.0	–	–	
234	Large Private Branch Exchanges				
	Electronic	11.1	–	0.0	
	Other	16.4	–	2.8	
	DDS	14.9	–	–4.0	
235	Public Telephone Equipment	9.3	–	–1.1	
241	Pole Lines	3.2	6.8	5.4	1982
242.1	Aerial Cable				
	Exchange	4.0	10.1	1.8	1982
242.2	Underground Cable				
	Exchange	4.1	6.5	1.9	1982
242.3	Buried Cable				
	Exchange	3.0	8.0	0.4	1982
242.4	Submarine Cable	3.3	4.8	0.1	1982
244	Underground Conduit	1.6	1.9	0.0	1982
261	Furniture & Office Equipment				
	Storeroom & Other	6.4	12.0	–0.5	1984
	Computer & AMA Systems	17.6	17.5	0.3	1984
	Art Works	0.0	–	0.0	
262	Company Official Equipment	10.1	–	–0.8	
264	Vehicles & Other Work Equipment				
	Motor Vehicles	10.3	12.8	–1.5	1984
	Other Work Equipment	6.0	16.1	–1.2	1984

#Except Accounts 235 and 262 which have an effective date of May 1, 1984, and the ELG rates for Accounts 212, 261, and 264 which have an effective date of January 1, 1984.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for The Chesapeake and Potomac Telephone Company of Maryland
Effective January 1, 1985#

Account No.	*Class or Subclass of Plant*	*VG Rate* (%)	*ELG Rate* (%)	*Net Salvage Rate* (%)	*First ELG Year*
212	Buildings	2.5	4.2	–0.2	1984
221	Central Office Equipment				
	Manual	33.5	–	0.0	
	Step-by-Step	13.7	–	1.2	
	Crossbar	12.7	–	0.1	
	Non-Ded. Circuit	7.4	13.1	0.0	1983
	DDS Circuit	8.0	12.0	0.0	1983
	Radio	5.7	11.5	–1.1	1983
	Analog Electronic	6.2	8.3	–0.2	1983
	Digital Electronic	5.0	8.6	0.0	1983
231	Station Apparatus				
	Teletypewriter	10.2	–	–0.9	
	Telephone & Miscellaneous	13.7	–	–2.9	
	Radio	12.9	–	–15.2	
232	Station Connections - Other	5.0	–	–	
234	Large Private Branch Exchanges				
	Electronic	15.8	–	0.0	
	Other	9.9	–	7.2	
	DDS	15.4	–	–3.7	
235	Public Telephone Equipment	10.0	–	–0.1	
241	Pole Lines	3.3	7.6	1.8	1982
242.1	Aerial Cable				
	Exchange	4.1	5.9	1.1	1982
	Toll	3.5	7.3	–3.6	1982
242.2	Underground Cable				
	Exchange	4.1	5.2	1.3	1982
	Toll	5.4	7.2	–4.2	1982
242.3	Buried Cable				
	Exchange	3.9	4.8	0.3	1982
	Toll	4.6	4.3	0.3	1982
242.4	Submarine Cable	3.6	5.0	0.1	1982
243	Aerial Wire	2.1	–	13.7	
244	Underground Conduit	1.7	1.9	0.0	1982
261	Furniture & Office Equipment				
	Storeroom & Other	5.1	10.0	–0.2	1984
	Computer & AMA Systems	15.3	14.7	1.5	1984
	Art Works	0.0	–	0.0	
262	Company Official Equipment	9.8	–	–5.0	
264	Vehicles & Other Work Equipment				
	Motor Vehicles	9.2	11.1	–0.8	1984
	Other Work Equipment	6.0	16.7	–1.3	1984

#Except Accounts 235 and 262 which have an effective date of May 1, 1984, and the ELG rates for Accounts 212, 261, and 264 which have an effective date of January 1, 1984.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for The Chesapeake and Potomac Telephone Company of Virginia
Effective January 1, 1984#

Account No.	*Class or Subclass of Plant*	*VG Rate* (%)	*ELG Rate* (%)	*Net Salvage Rate* (%)	*First ELG Year*
212	Buildings	2.3	4.8	–0.0	1984
221	Central Office Equipment				
	Manual	18.6	–	0.0	
	Step-by-Step	23.0	–	–0.7	
	Crossbar	26.0	–	–0.6	
	Non-Ded. Circuit	6.7	11.9	–0.1	1983
	DDS Circuit	7.8	10.3	0.2	1983
	Radio	4.8	8.7	0.4	1983
	Electronic	6.2	8.6	–0.3	1983
231	Station Apparatus				
	Teletypewriter	7.7	–	–1.0	
	Telephone & Miscellaneous	15.8	–	–3.9	
	Radio	7.8	–	–0.3	
232	Station Connections - Other	5.0	–	–	
234	Large Private Branch Exchanges				
	Electronic	12.1	–	–0.5	
	Other	13.2	–	2.3	
	DDS	14.3	–	–3.5	
235	Public Telephone Equipment	9.7	–	–0.1	
241	Pole Lines	3.1	7.7	1.1	1982
242.1	Aerial Cable				
	Exchange	4.3	6.8	0.4	1982
	Toll	3.7	6.1	1.5	1982
242.2	Underground Cable				
	Exchange	3.1	4.6	0.0	1982
	Toll	2.5	4.2	0.5	1982
242.3	Buried Cable				
	Exchange	4.6	5.6	0.2	1982
	Toll	4.7	5.8	0.4	1982
242.4	Submarine Cable	4.4	6.1	0.2	1982
243	Aerial Wire				
	Exchange	8.3	–	8.6	
244	Underground Conduit	1.7	1.8	0.0	1982
261	Furniture & Office Equipment				
	Storeroom & Other	5.3	10.9	–0.4	1984
	Computer & AMA Systems	14.3	20.0	–2.2	1984
	Art Works	0.0	–	0.0	
262	Company Official Equipment	8.8	–	–0.8	
264	Vehicles & Other Work Equipment				
	Motor Vehicles	11.2	13.3	–1.3	1984
	Other Work Equipment	6.3	17.2	–1.3	1984

#Except Accounts 235 and 262 which have an effective date of May 1, 1984.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for The Chesapeake and Potomac Telephone Company of West Virginia

Effective January 1, 1985#

Account No.	*Class or Subclass of Plant*	*VG Rate* (%)	*ELG Rate* (%)	*Net Salvage Rate* (%)	*First ELG Year*
212	Buildings	2.5	5.0	0.0	1984
221	Central Office Equipment				
	Manual[1]	–	–	–	
	Step-by-Step	12.7	–	0.9	
	Crossbar	14.9	–	1.0	
	Non-Ded. Circuit	6.6	11.4	0.0	1983
	DDS Circuit	4.2	12.3	0.4	1983
	Radiotelephone	4.5	8.5	0.8	1983
	Analog Electronic	5.6	7.8	–0.2	1983
	Digital Electronic	4.5	8.0	0.0	1983
231	Station Apparatus				
	Teletypewriter	8.4	–	–	
	Telephone & Miscellaneous	9.7	–	–	
	Radio	0.0	–	–	
232	Station Connections - Other	5.0	–	–	
234	Large Private Branch Exchanges				
	Electronic	13.1	–	–	
	Other	25.9	–	–	
	DDS	17.8	–	–	
235	Public Telephone Equipment	8.9	–	–0.6	
241	Pole Lines	3.7	7.8	2.2	1982
242.1	Aerial Cable				
	Exchange	4.6	6.5	0.5	1982
	Toll	4.0	8.0	–1.6	1982
242.2	Underground Cable				
	Exchange	3.4	6.1	–0.4	1982
	Toll	3.2	7.7	–0.6	1982
242.3	Buried Cable	5.6	6.1	0.3	1982
242.4	Submarine Cable	3.7	6.1	0.1	1982
243	Aerial Wire				
	Exchange	6.0	–	2.4	
244	Underground Conduit				
	Exchange	1.7	1.6	0.0	1982
261	Furniture & Office Equipment				
	Furniture & Office Equip.	3.8	6.8	–0.5	1984
	Computer & AMA Systems	16.8	15.6	–0.1	1984
	Art Works	0.0	–	0.0	
262	Company Official Equipment	8.9	–	–1.1	
264	Vehicles & Other Work Equipment				
	Motor Vehicles	11.1	13.9	–0.3	1984
	Other Work Equipment	7.1	17.2	–1.5	1984

#Except Accounts 235 and 262 which have an effective date of May 1, 1984, and the ELG rates for Accounts 212, 261, and 264 which have an effective date of January 1, 1984.

[1] The January 1, 1984 net book cost is to be amortized in equal amounts over a 2 year period.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for Continental Telephone Company of Virginia

Effective January 1, 1984

Account No.	*Class or Subclass of Plant*	*Average Remaining Life* (years)	*Future Net Salvage* (%)	*Reserve Ratio* (%)	*Remaining Life Rate* (%)	*First ELG Year*
212	Buildings	33.0	1.0	18.9	2.4	
	Leasehold Improvements	7.1	0.0	41.6	8.2	
221	Central Office Equipment					
	Step-by-Step	2.5	2.0	34.7	25.3	
	Mobile	2.5	2.0	34.7	25.3	
	Switchboard (Cord)	4.5	0.0	73.9	5.8	
	Switchboard (TSD)	4.4	0.0	85.5	3.3	
	Analog Electronic	5.5	0.0	34.8	11.9	
	Crossbar	–	–	100.0	0.0	
	Analog Microwave[1]	–	–	–	–	
	Digital Microwave	12.9	0.0	15.9	6.5	1982
	Power	5.0	1.0	18.9	16.0	
	Circuit	7.5	10.0	18.2	9.6	1982
	ANI	2.9	2.0	66.5	10.9	
	Digital Electronic	12.1	0.0	8.6	7.6	1982
231	Station Apparatus					
	"Deregulated"	5.5	12.0	6.9	14.7	
	Spec. Service Etc.	–	–	–	9.6	
232	Station Connections					
	Drop - Aerial	–	–	–	4.0	
	Drop - Buried	–	–	–	3.8	
234	Large Private Branch Exchanges	2.5	0.0	63.8	14.5	
235	Public Telephone Equipment	7.1	0.0	21.5	11.1	
241	Pole Lines	15.0	−55.0	49.0	7.1	1982
24 .1	Aerial Cable	17.5	2.0	27.2	4.0	1982
242.2	Underground Cable	26.0	0.0	22.0	3.0	1982
242.3	Buried Cable	21.0	4.0	16.0	3.8	1982
242.4	Submarine Cable	17.8	0.0	55.6	2.5	1982
243	Aerial Wire[2]	–	–	–	–	
244	Underground Conduit	39.0	0.0	25.0	1.9	1982
261	Furniture & Office Equipment					
	Furniture & Office Equipment	18.3	8.0	39.4	2.9	
	Minor Items[3]	–	–	–	–	
262	Company Official Equipment	8.0	0.0	20.4	10.0	
264	Vehicles & Other Work Equipment					
	Vehicles	2.0	20.0	78.4	0.8	
	Other Work Equipment	13.8	0.0	42.3	4.2	
	Minor Items[3]	–	–	–	–	

[1] The January 1, 1984 net book cost is to be amortized over a 3 year period.

[2] The January 1, 1984 net book cost is to be amortized over a 4 year period.

[3] The January 1, 1984 net book cost is to be amortized over a 5 year period.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for General Telephone Company of Florida

Effective January 1, 1985#

Account No.	*Class or Subclass of Plant*	*Average Remaining Life* (years)	*Future Net Salvage* (%)	*Reserve Ratio* (%)	*Remaining Life Rate* (%)	*First ELG Year*
212	Buildings	31.0	0.0	21.00	2.5	1984
221	Central Office Equipment					
	Manual Switching	13.4	1.0	8.30	6.8	
	Automatic Sw (Electro-Mech)	2.8	–1.2	50.10	18.3	
	Electronic Switching	10.8	0.0	29.40	6.5	1983
	Digital Switching	13.7	5.0	14.80	5.9	1983
	Auto Msg Rec (Electro-Mech)	2.8	–1.4	63.70	13.5	
	Circuit	9.2	17.0	17.70	7.1	1983
	Radio	6.7	3.0	37.60	8.9	1983
231	Station Apparatus					
	Telephone	–	–	–	13.1	
	Teletypewriter	–	–	–	6.7	
	Radiotelephone	–	–	–	8.6	
232	Station Connections - Other	–	–	–	5.0	
234	Large Private Branch Exchanges	–	–	–	17.7	
235	Public Telephone Equipment	–	–	–	13.8	
241	Pole Lines	16.60	–60.0	37.60	7.4	1982
242.1	Aerial Cable	18.50	–6.0	33.60	3.9	1982
242.2	Underground Cable	27.00	12.0	16.50	2.6	1982
242.3	Buried Cable	24.00	–5.0	21.40	3.5	1982
242.4	Submarine Cable	17.40	–12.0	42.10	4.0	1982
243	Aerial Wire	7.60	30.0	51.20	10.4	
244	Underground Conduit	47.00	–7.0	15.40	1.9	1982
261	Furniture & Office Equipment					
	Furniture	12.90	1.0	15.20	6.5	1984
	Computer	5.70	1.0	17.20	14.4	1984
	Office Equipment	7.20	1.0	8.50	12.6	1984
262	Company Official Equipment	–	–	–	12.6	
264	Vehicles & Other Work Equipment					
	Motor Vehicles	6.90	20.0	54.60	3.7	1984
	Vehicle Shop Equipment	13.60	6.2	31.50	4.6	
	Tools and Other Work Equipment	6.90	2.0	29.60	9.9	1984

#Except Accounts 235 and 262 which have an effective date of May 1, 1984.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for General Telephone Company of Indiana

Effective January 1, 1985#

Account No.	*Class or Subclass of Plant*	*Average Remaining Life* (years)	*Future Net Salvage* (%)	*Reserve Ratio* (%)	*Remaining Life Rate* (%)	*First ELG Year*
212	Buildings	39.0	5.0	16.61	2.0	1985
221	Central Office Equipment					
	Manual Switching	6.7	-4.0	-1.70	15.8	
	Automatic Sw (Electro-Mech)	4.3	-5.0	37.40	15.7	
	Auto Message Recording	4.3	-3.0	12.10	21.1	
	Circuit	9.1	5.0	21.73	8.1	1983
	Radio	7.7	-2.0	16.39	11.1	1983
	Electronic Switching	11.7	6.0	21.19	6.2	1983
	Digital Electronic	13.2	4.0	10.10	6.5	1983
231	Station Apparatus					
	Telephone	–	–		12.2	
	Teletypewriter	–	–		7.5	
	Radiotelephone	–	–		4.5	
232	Station Connections - Other	–	–		5.0	
234	Large Private Branch Exchanges	–	–		14.3	
235	Public Telephone Equipment	–	–		12.2	
241	Pole Lines	13.9	-45.0	40.00	7.6	1982
242.1	Aerial Cable	15.5	-20.0	36.58	5.4	1982
242.2	Underground Cable	31.0	-29.0	24.10	3.4	1982
242.3	Buried Cable	18.1	-8.0	24.74	4.6	1982
242.4	Submarine Cable	5.1	0.0	97.25	0.5	
243	Aerial Wire	4.6	-90.0	-13.03	44.1	
244	Underground Conduit	46.0	-10.0	25.13	1.8	1982
261	Furniture & Office Equipment	14.2	4.0	27.84	4.8	1984
	Computers	5.8	5.0	5.36	15.5	1984
262	Company Official Equipment	–	–	–	12.1	
264	Vehicles & Other Work Equipment					
	Motor Vehicles	3.5	17.0	41.04	12.0	1984
	Aircraft	5.4	65.0	12.34	4.2	1984
	Vehicle Shop Equipment	15.6	7.0	23.08	4.5	1984
	Tools and Work Equipment	13.9	18.0	30.99	3.7	1984

#Except Accounts 235 and 262 which have an effective date of May 1, 1984.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for General Telephone Company of Indiana

Effective January 1, 1985#

Account No.	*Class or Subclass of Plant*	*Average Remaining Life* (years)	*Future Net Salvage* (%)	*Reserve Ratio* (%)	*Remaining Life Rate* (%)	*First ELG Year*
212	Buildings	31.0	–3.0	26.37	2.5	1985
221	Central Office Equipment					
	Manual Switching	4.7	–4.0	52.71	10.9	
	Automatic Sw (Electro-Mech)	5.3	2.0	41.50	10.7	
	Auto Message Recording	3.0	–2.0	71.15	10.3	
	Circuit	9.0	4.0	21.73	8.3	1983
	Radio	9.7	–3.0	32.57	7.3	1983
	Electronic Switching	10.2	5.0	39.47	5.4	1983
	Digital Electronic	12.5	0.0	6.66	7.5	1983
	ETS4/TRS4	3.0	–4.0	63.28	13.6	
231	Station Apparatus					
	Telephone	–	–	–	11.9	
	Teletypewriter	–	–	–	7.3	
	Radiotelephones	–	–	–	8.2	
232	Station Connections - Other	–	–	–	5.0	
234	Large Private Branch Exchanges	–	–	–	18.0	
235	Public Telephone Equipment	–	–	–	11.9	
241	Pole Lines	15.2	–60.0	34.21	8.3	1982
242.1	Aerial Cable	20.0	–22.0	35.62	4.3	1982
242.2	Underground Cable	28.0	–15.0	23.23	3.3	1982
242.3	Buried Cable	19.8	7.0	23.96	4.2	1982
242.4	Submarine Cable	11.4	–2.0	14.72	7.7	1982
243	Aerial Wire[1]	–	–	–	–	
244	Underground Conduit	46.0	–8.0	15.93	2.0	1982
261	Furniture & Office Equipment	12.1	5.0	34.43	5.0	1984
	Computers	5.2	5.0	6.50	17.0	1984
262	Company Official Equipment	–	–	–	14.0	
264	Vehicles & Other Work Equipment					
	Motor Vehicles	4.3	12.0	46.25	9.7	1984
	Aircraft	2.5	40.0	50.37	3.9	
	Vehicle Shop Equipment	9.0	5.0	24.64	7.8	1984
	Tools and Other Work Equipment	8.0	5.0	43.91	6.4	1984

#Except Accounts 235 and 262 which have an effective date of May 1, 1984.

[1] The January 1, 1984 net book cost less the future net salvage estimate of -50% is to be amortized over a 4 year period.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for General Telephone Company of Indiana

Effective January 1, 1985#

Account No.	*Class or Subclass of Plant*	*Average Remaining Life*	*Future Net Salvage*	*Reserve Ratio*	*Remaining Life Rate*	*First ELG Year*
		(years)	(%)	(%)	(%)	
212	Buildings	19.5	8.0	30.68	3.1	1985
221	Central Office Equipment					
	Manual Switching	1.7	-6.0	59.20	27.5	
	Automatic Sw (Electro-Mech)	5.1	0.0	49.88	9.8	
	Automatic Message Recording	2.7	-5.0	47.25	21.4	
	Circuit	9.4	4.0	19.00	8.2	1983
	Radio	3.8	-1.0	70.64	8.0	1983
	Electronic Switching	11.3	2.0	18.12	7.1	1983
	Digital Switching	12.1	1.0	3.31	7.9	1983
231	Station Apparatus					
	Telephones	–	–	–	11.3	
	Small PBX	–	–	–	36.2	
	Telephone Booths	–	–	–	13.9	
	Teletypewriter	–	–	–	10.2	
	Radiotelephone	–	–	–	8.7	
232	Station Connections - Other	–	–	–	5.0	
234	Large Private Branch Exchanges	–	–	–	13.0	
235	Public Telephone Equipment	–	–	–	12.2	
241	Pole Lines	13.8	–45.0	34.51	8.0	1982
242.1	Aerial Cable	19.8	–25.0	35.73	4.5	1982
242.2	Underground Cable	22.0	–22.0	31.87	4.1	1982
242.3	Buried Cable	18.3	–8.0	21.52	4.7	1982
242.4	Submarine Cable	12.3	0.0	45.09	4.5	
243	Aerial Wire	8.5	–67.0	–8.37	20.6	
244	Underground Conduit	45.0	–12.0	25.16	1.9	1982
261	Furniture & Office Equipment	14.4	12.0	35.59	3.6	1984
	Computers	5.4	5.0	10.61	15.6	1984
262	Company Official Equipment	–	–	–	11.3	
264	Vehicles & Other Work Equipment					
	Motor Vehicles	3.3	21.0	49.00	9.1	1984
	Vehicle Shop Equipment	7.9	5.0	19.59	9.5	1984
	Tools and Other Work Equipment	13.7	12.0	46.19	3.1	1984

#Except Accounts 235 and 262 which have an effective date of May 1, 1984.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for Illinois Bell Telephone Company

Effective January 1, 1985#

Account No.	*Class or Subclass of Plant*	*Average Remaining Life* (years)	*Future Net Salvage* (%)	*Reserve Ratio* (%)	*Remaining Life Rate* (%)	*Annual Amort. Expense** ($000)	*First ELG Year*
212	Buildings	32.0	0.0	25.12	2.3	2,304	
221	Central Office Equipment						
	Manual				4.9		
	Step-by-Step	–	–	–	19.8	–	
	Crossbar	–	–	–	18.5	–	
	Non-Ded. Circuit	8.1	–4.0	37.9	8.2	14,813	
	DDS Circuit	8.5	2.0	20.3	9.1	7	
	Radio	10.2	–6.0	37.2	6.7	–	
	Analog Electronic	12.7	0.0	24.65	5.9	21,572	
	Digital Electronic	15.4	0.0	15.64	5.5	855	
231	Station Apparatus						
	Teletypewriter	–	–	–	13.5	–	
	Telephone & Miscellaneous	–	–	–	12.1	–	
	Radio	–	–	–	4.2	–	
232	Station Connections - Other	–	–	–	5.0	–	
234	Large Private Branch Exchanges						
	Electronic	–	–	–	38.6	–	
	Other	–	–	–	17.8	–	
	DDS	–	–	–	18.2	–	
235	Public Telephone Equipment						
	Teletypewriter	–	–	–	13.5	–	
	Telephone & Miscellaneous	–	–	–	12.1	–	
	Radio	–	–	–	4.2	–	
	PBX Retirement Units	–	–	–	38.6	–	
241	Pole Lines	17.3	–81.0	73.48	6.2	2,025	
242.1	Aerial Cable						
	Exchange-Bldg	19.4	–20.0	26.52	4.8	3,604	
	Exchange-Other	16.8	–25.0	37.85	5.2	4,812	
	Toll	1.7	68.0	20.79	6.6	202	
242.2	Underground Cable						
	Exchange-Main & Sub.	20.0	–13.0	35.71	3.9	18,124	
	Exchange-Trunk	15.8	14.0	41.73	2.8	301	
	Toll	11.4	36.0	35.19	2.5	1,350	
242.3	Buried Cable						
	Exchange	22.0	–10.0	26.0	3.8	5,944	
	Toll	13.7	–2.0	46.57	4.0	969	
242.4	Submarine Cable	11.8	2.0	68.2	2.5	-	
243	Aerial Wire						
	Exchange	2.7	–63.0	107.34	20.6	135	
24	Underground Conduit	51.0	–5.0	21.32	1.6	676	
261	Furniture & Office Equipment						
	Furniture	9.8	3.0	25.04	7.4	456	
	Computer & AMA Systems	4.9	10.0	44.3	9.3	–	
262	Company Official Equipment						
	Coin Operated	–	–	–	12.1	–	
	Coinless	–	–	–	12.1	–	
	Other	–	–	–	12.1	–	
264	Vehicles & Other Work Equipment						
	Motor Vehicles	4.1	10.0	51.5	9.4	–	
	Other Work Equipment	6.6	9.0	35.49	8.4	283	

***Reflects amortization of the January 1, 1984 reserve deficiencies over a 5 year period; remaining life rates are continued for these accounts using the calculated reserve ratio.**
#Except Accounts 235 and 262 which have an effective date of January 1, 1984.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for Indiana Bell Telephone Company, Incorporated

Effective January 1, 1985

Account No.	*Class or Subclass of Plant*	*VG Rate* %	*ELG Rate* %	*Net Salvage Rate* %	*First ELG Year*
212	Buildings	2.5	3.8	0.0	1985
221	Central Office Equipment				
	Step-by-Step	22.4	–	-0.2	
	Crossbar	19.6	–	0.7	
	Non-Ded Circuit	8.4	13.9	-1.2	1983
	DDS Circuit	7.9	11.8	-0.5	1983
	Radio	10.6	13.8	0.8	1983
	Analog Electronic	6.6	8.9	-0.1	1983
	Digital Electronic	0.0	8.6	0.0	1983
231	Station Apparatus				
	Teletypewriter	14.3	–	–	
	Telephone & Miscellaneous	10.7	–	–	
	Radio	3.8	–	–	
232	Station Connections—Other	5.0	–	–	
234	Large Private Branch Exchanges				
	Electronic	14.2	–	–	
	Other	28.0	–	–	
	DDS	17.6	–	–	
235	Public Telephone Equipment				
	Coin Operated Equipment	10.7	–	–	
	Coinless Equipment	10.7	–	–	
	Other	10.7	–	–	
241	Pole Lines	3.4	8.5	3.5	1982
242.1	Aerial Cable	3.9	6.7	1.0	1982
242.2	Underground Cable	3.3	7.3	-0.4	1982
242.3	Buried Cable	3.8	5.5	0.4	1982
242.4	Submarine Cable	4.1	4.5	-0.1	1982
243	Aerial Wire	9.3	0.0	2.5	
244	Underground Conduit	1.7	1.9	0.8	1982
261	Furniture & Office Equipment				
	Storeroom & Other	4.8	6.0	-0.1	1985
	Computer & AMA Systems	15.4	17.5	-0.5	1985
262	Company Official Equipment				
	Teletypewriter	14.3	–	–	
	Telephone & Miscellaneous	10.7	–	–	
	Radio	3.8	–	–	
	Non-electronic & Miscellaneous	28.0	–	–	
	Electronic PBX	14.2	–	–	
	DDS PBX	17.6	–	–	
264	Vehicles & Other Work Equipment				
	Motor Vehicles	13.7	16.7	-1.4	1985
	Other Work Equipment	7.8	10.4	-0.3	1985

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for New England Telephone and Telegraph Company—Maine
Effective January 1, 1985

Account No.	*Class or Subclass of Plant*	*VG Rate* %	*ELG Rate* %	*Net Salvage Rate* %	*First ELG Year*
212	Buildings	2.9	4.2	-0.1	1983
221	Central Office Equipment				
	Manual[1]	–	–	–	
	Step-by-Step	10.0	–	0.5	
	Crossbar	14.3	–	-0.3	
	Non-Ded Circuit	7.5	10.2	0.1	1983
	DDS Circuit	12.4	15.8	0.6	1983
	Radio	5.7	11.5	0.4	1983
	Electronic	6.1	9.2	0.0	1983
231	Station Apparatus				
	Teletypewriter	9.0	–	–	
	Telephone & Miscellaneous	6.3	–	–	
	Radio	5.7	–	–	
232	Station Connections—Other	5.0	–	–	
234	Large Private Branch Exchanges				
	Electronic	12.7	–	–	
	Other	22.2	–	–	
	DDS	5.1	–	–	
235	Public Telephone Equipment	6.6	–	-0.1	
241	Pole Lines	2.9	6.0	3.4	1982
242.1	Aerial Cable				
	Exchange	4.0	5.3	1.0	1982
	Toll	3.1	6.3	-0.5	1982
242.2	Underground Cable				
	Exchange	3.9	5.3	0.5	1982
	Toll	4.2	5.5	0.1	1982
242.3	Buried Cable				
	Exchange	3.5	7.0	0.6	1982
	Toll	4.3	5.4	0.7	1982
242.4	Submarine Cable				
	Exchange	2.6	4.8	0.1	1982
	Toll	3.8	3.9	-0.1	1982
243	Aerial Wire				
	Exchange	15.3	–	7.5	
244	Underground Conduit	1.6	1.7	0.3	1982
261	Furniture & Office Equipment				
	Other	4.5	8.4	-0.2	1983
	Computer & AMA Systems	2.4	15.6	4.8	1983
	Art Works	0.0	–	0.0	
262	Company Official Equipment	12.2	–	-1.0	
264	Vehicles & Other Work Equipment				
	Motor Vehicles	14.5	15.8	-0.9	1983
	Other Work Equipment	8.0	12.2	-1.1	1983

[1] The January 1, 1984 debit depreciation reserve balance of $640,048 is to be amortized in equal amounts over a 2 year period.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for New England Telephone and Telegraph Company—Massachusetts
Effective January 1, 1985

Account No.	*Class or Subclass of Plant*	*VG Rate* %	*ELG Rate* %	*Net Salvage Rate* %	*First ELG Year*
212	Buildings	2.7	3.6	–0.3	1983
221	Central Office Equipment				
	Step-by-Step	7.6	–	0.2	
	Crossbar	17.2	–	–0.9	
	Non-Ded Circuit	7.0	11.6	0.3	1983
	DDS Circuit	9.6	22.5	0.2	1983
	Radio	5.5	9.1	0.2	1983
	Electronic	5.8	8.9	–0.1	1983
231	Station Apparatus				
	Teletypewriter	8.9	–	–	
	Telephone & Miscellaneous	11.4	–	–	
	Radio	3.9	–	–	
232	Station Connections—Other	5.0	–	–	
234	Large Private Branch Exchanges				
	Electronic	12.1	–	–	
	Other	24.0	–	–	
	DDS	16.0	–	–	
235	Public Telephone Equipment	11.0	–	–0.1	
241	Pole Lines	2.3	5.6	2.5	1982
242.1	Aerial Cable				
	Exchange	3.5	6.1	0.8	1982
	Toll	2.4	5.2	–2.8	1982
242.2	Underground Cable				
	Exchange	3.8	4.8	1.3	1982
	Toll	3.9	7.2	–1.8	1982
242.3	Buried Cable				
	Exchange	3.1	4.9	0.2	1982
	Toll	3.5	7.6	0.2	1982
242.4	Submarine Cable				
	Exchange	1.4	3.7	–0.1	1982
	Toll	1.3	3.1	–0.1	1982
243	Aerial Wire				
	Exchange	15.8	–	9.3	
244	Underground Conduit	1.6	1.7	0.1	1982
261	Furniture & Office Equipment				
	Other	5.8	9.0	–1.1	1983
	Computer & AMA Systems	13.0	15.8	–0.1	1983
	Art Works	0.0	–	0.0	
262	Company Official Equipment	13.6	–	–0.9	
264	Vehicles & Other Work Equipment				
	Motor Vehicles	10.9	13.0	–1.9	1983
	Other Work Equipment	7.8	12.3	–0.4	1983

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for New England Telephone and Telegraph Company—New Hampshire
Effective December 1, 1984

Account No.	*Class or Subclass of Plant*	*VG Rate %*	*ELG Rate %*	*Net Salvage Rate %*	*First ELG Year*
212	Buildings	2.6	3.8	–0.3	1983
221	Central Office Equipment				
	Manual[1]	–	–	–	
	Step-by-Step	8.4	–	0.5	
	Crossbar[2]	10.5	–	–0.2	
	Non-Ded Circuit	7.8	11.8	1.0	1983
	DDS Circuit	11.2	16.7	0.6	1983
	Radio	7.6	6.7	0.0	1983
	Electronic	6.2	8.7	0.0	1983
231	Station Apparatus				
	Teletypewriter	12.1	–	–	
	Telephone & Miscellaneous	9.1			
	Radio	0.0	–	–	
232	Station Connections—Other	5.0	–	–	
234	Large Private Branch Exchanges				
	Electronic	13.0	–	–	
	Other	23.7	–	–	
	DDS	16.5	–	–	
235	Public Telephone Equipment	9.1	–	–0.1	
241	Pole Lines	3.0	5.9	1.7	1982
242.1	Aerial Cable				
	Exchange	3.8	5.7	0.7	1982
	Toll	3.7	6.2	–0.9	1982
242.2	Underground Cable				
	Exchange	3.9	5.2	0.1	1982
	Toll	4.6	5.5	–0.6	1982
242.3	Buried Cable				
	Exchange	4.0	6.1	0.2	1982
	Toll	4.4	6.1	0.2	1982
242.4	Submarine Cable				
	Exchange	3.0	3.9	0.4	1982
	Toll	2.2	3.3	0.1	1982
243	Aerial Wire				
	Exchange	18.9	–	9.7	
244	Underground Conduit	1.6	1.7	0.1	1982
261	Furniture & Office Equipment				
	Other	5.0	8.3	–0.3	1982
	Computer & AMA Systems	10.2	15.7	0.9	1983
	Art Works	0.0	–	0.0	
262	Company Official Equipment	13.0	–	–0.9	
264	Vehicles & Other Work Equipment				
	Motor Vehicles	14.5	13.5	–1.0	1983
	Other Work Equipment	8.4	12.3	–1.9	1983

[1] The January 1, 1984 credit depreciation reserve balance of $158,000 is to be amortized over a 2 year period.

[2] The January 1, 1984 reserve deficiency of $8,069,429 is to be amortized over 2 year period; remaining life rates are continued for this account using the calculated reserve ratio.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for New England Telephone and Telegraph Company—Rhode Island
Effective January 1, 1985

Account No.	*Class or Subclass of Plant*	*VG Rate*	*ELG Rate*	*Net Salvage Rate*	*First ELG Year*
		%	%	%	
212	Buildings	2.5	3.2	–0.3	1983
221	Central Office Equipment				
	Step-by-Step	13.0	–	1.2	
	Crossbar	12.6	–	–0.2	
	Non-Ded Circuit	6.0	13.5	–0.3	1983
	DDS Circuit	15.4	24.6	0.3	1983
	Radio	1.7	8.7	0.3	1983
	Electronic	5.7	8.7	–0.1	1983
231	Station Apparatus				
	Teletypewriter	8.3	–	–	
	Telephone & Miscellaneous	6.3	–	–	
	Radio	0.0	–	–	
232	Station Connections—Other	5.0	–	–	
234	Large Private Branch Exchanges				
	Electronic	12.1	–	–	
	Other	17.1	–	–	
	DDS	9.8	–	–	
235	Public Telephone Equipment	7.1	–	–0.1	
241	Pole Lines	2.2	5.0	2.4	1982
242.1	Aerial Cable				
	Exchange	3.1	5.2	1.6	1982
	Toll	2.6	6.4	–0.9	1982
242.2	Underground Cable				
	Exchange	3.7	4.3	0.9	1982
	Toll	4.2	5.8	–2.5	1982
242.3	Buried Cable				
	Exchange	3.1	4.6	0.2	1982
	Toll	4.0	–	0.2	1982
242.4	Submarine Cable				
	Exchange	0.5	3.7	0.1	1982
	Toll	1.3	0.0	0.0	
243	Aerial Wire				
	Exchange	11.0	–	5.8	
244	Underground Conduit	1.5	1.7	0.1	1983
261	Furniture & Office Equipment				
	Other	3.0	7.0	–0.5	1983
	Computer & AMA Systems	14.5	15.5	1.0	1983
	Art Works	0.0	–	0.0	
262	Company Official Equipment	12.4	–	–1.1	
264	Vehicles & Other Work Equipment				
	Motor Vehicles	11.1	12.8	–1.2	1983
	Other Work Equipment	8.4	12.2	–0.8	1983

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for New England Telephone and Telegraph Company—Vermont
Effective October 1, 1984

Account No.	*Class or Subclass of Plant*	*VG Rate* %	*ELG Rate* %	*Net Salvage Rate* %	*First ELG Year*
212	**Buildings**	**3.4**	**4.4**	**–0.3**	**1983**
221	**Central Office Equipment**				
	Step-by-Step[1]	**9.5**	**–**	**0.6**	
	Crossbar[2]	**8.7**	**–**	**0.0**	
	Non-Ded. Circuit	**8.6**	**10.7**	**–0.1**	**1983**
	DDS Circuit	**17.5**	**38.5**	**0.2**	**1983**
	Radio	**6.2**	**12.5**	**0.5**	**1983**
	Electronic	**6.2**	**9.4**	**0.0**	**1983**
231	**Station Apparatus**				
	Teletypewriter	**11.3**	**–**	**–**	
	Telephone & Miscellaneous	**6.4**	**–**	**–**	
	Radio	**0.0**	**–**	**–**	
232	**Station Connections—Other**	**5.0**	**–**	**–**	
234	**Large Private Branch Exchanges**				
	Electronic	**12.6**	**–**	**–**	
	Other	**23.5**	**–**	**–**	
	DDS	**19.0**	**–**	**–**	
235	**Public Telephone Equipment**	**6.8**	**–**	**–0.1**	
241	**Pole Lines**	**3.4**	**6.4**	**2.7**	**1982**
242.1	**Aerial Cable**				
	Exchange	**4.0**	**5.3**	**0.6**	**1982**
	Toll	**3.2**	**6.2**	**–0.5**	**1982**
242.2	**Underground Cable**				
	Exchange	**3.9**	**4.6**	**0.4**	**1982**
	Toll	**3.8**	**5.7**	**0.7**	**1982**
242.3	**Buried Cable**				
	Exchange	**4.2**	**6.5**	**0.2**	**1982**
	Toll	**4.0**	**5.8**	**0.3**	**1982**
242.4	**Submarine Cable**				
	Exchange	**2.9**	**3.6**	**0.1**	**1982**
	Toll	**1.6**	**0.0**	**–0.1**	**1982**
243	**Aerial Wire**				
	Exchange[3]	**11.5**	**–**	**5.7**	
244	**Underground Conduit**	**1.6**	**1.7**	**0.1**	**1982**
261	**Furniture & Office Equipment**				
	Other	**5.9**	**8.5**	**–0.6**	**1983**
	Computer & AMA Systems	**23.1**	**0.0**	**–14.6**	**1983**
	Art Works	**0.0**	**–**	**0.0**	
262	**Company Official Equipment**	**13.1**	**–**	**–1.0**	
264	**Vehicles & Other Work Equipment**				
	Motor Vehicles	**21.2**	**15.3**	**–0.2**	**1983**
	Other Work Equipment	**6.0**	**10.1**	**0.1**	**1983**

[1] The January 1, 1984 reserve deficiency of $4,671,588 is to be amortized over a 3 year period; remaining life rates are continued for this account using the calculated reserve ratio.

[2] The January 1, 1984 reserve deficiency of $2,327,293 is to be amortized over a 3 year period; remaining life rates are continued for this account using the calculated reserve ratio.

[3] The January 1, 1984 reserve deficiency of $1,047,501 is to be amortized over a 3 year period; remaining life rates are continued for this account using the calculated reserve ratio.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for South Central Bell Telephone Company—Alabama
Effective August 1, 1984#

Account No.	*Class or Subclass of Plant*	*VG Rate* %	*ELG Rate* %	*Net Salvage Rate* %	*First ELG Year*
212	Buildings	2.2	4.5	–0.1	1984
221	Central Office Equipment				
	Step-by-Step	11.1	–	–0.9	
	Crossbar	18.9	–	–1.7	
	Non-Ded Circuit	6.8	16.1	–0.2	1982
	DDS Circuit	8.5	14.1	0.3	1982
	Radio	3.2	8.6	1.4	1982
	Electronic	5.5	8.2	–0.2	1982
231	Station Apparatus				
	Teletypewriter	10.2	–	–	
	Telephone & Miscellaneous	8.4	–	–	
	Radio	6.3	–	–	
232	Station Connections—Other	5.0	–	–	
234	Large Private Branch Exchanges				
	Electronic	11.9	–	–	
	Other	24.2	–	–	
	DDS	17.8	–	–	
235	Public Telephone Equipment	8.4	–	0.0	
241	Pole Lines	3.6	7.6	1.3	1982
242.1	Aerial Cable				
	Exchange	6.1	7.1	0.5	1982
	Toll	10.4	8.8	–0.7	1982
242.2	Underground Cable				
	Exchange	3.4	6.4	–0.6	1982
	Toll	3.5	5.7	–0.5	1982
242.3	Buried Cable				
	Exchange	4.9	5.0	0.3	1982
	Toll	3.8	7.0	0.0	1982
242.4	Submarine Cable	3.1	6.9	–0.1	1982
243	Aerial Wire—Exchange	13.4	23.8	4.3	1984
244	Underground Conduit	1.5	2.5	0.1	1982
261	Furniture & Office Equipment				
	Storeroom & Other	4.5	7.1	–0.2	1984
	Computer & AMA Systems	13.1	17.5	–0.6	1984
	Art Works	0.0	–	0.0	
262	Company Official Equipment	9.7	–	0.0	
264	Vehicles & Other Work Equipment				
	Motor Vehicles	12.8	12.3	–1.5	1984
	Other Work Equipment	11.8	10.1	–4.3	1984

#Except Accounts 235 and 262 which have an effective date of April 1, 1984.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for South Central Bell Telephone Company—Kentucky

Effective January 1, 1985#

Account No.	*Class or Subclass of Plant*	*VG Rate* %	*ELG Rate* %	*Net Salvage Rate* %	*First ELG Year*
212	Buildings	2.4	4.3	0.0	1985
221	Central Office Equipment				
	Step-by-Step	10.9	–	–1.3	
	Crossbar	15.9	–	–1.5	
	Non-Ded Circuit	7.9	16.9	–1.0	1982
	DDS Circuit	9.1	13.2	–0.1	1982
	Radio	6.1	9.6	0.3	1982
	Electronic	5.4	8.1	–0.3	1982
231	Station Apparatus				
	Teletypewriter	14.9	–	–	
	Telephone & Miscellaneous	10.7	–	–	
	Radio	0.1	–	–	
232	Station Connections—Other	5.0	–	–	
234	Large Private Branch Exchanges				
	Electronic	13.1	–	–	
	Other	30.3	–	–	
	DDS	17.2	–	–	
235	Public Telephone Equipment	10.7	–	0.0	
241	Pole Lines	3.8	8.3	2.3	1982
242.1	Aerial Cable				
	Exchange	5.4	7.5	0.2	1982
	Toll	5.2	7.9	–1.6	1982
242.2	Underground Cable				
	Exchange	3.5	6.5	–0.1	1982
	Toll	4.3	6.7	–0.7	1982
242.3	Buried Cable				
	Exchange	4.9	5.8	0.2	1982
	Toll	4.3	6.9	0.0	1982
242.4	Submarine Cable	3.2	7.9	0.0	1982
243	Aerial Wire				
	Exchange	8.8	21.7	3.0	1985
244	Underground Conduit	1.5	2.5	0.1	1982
261	Furniture & Office Equipment				
	Storeroom & Other	7.9	8.8	–0.3	1985
	Computer & AMA Systems	14.3	17.5	0.0	1985
	Art Works	0.0	–	0.0	
262	Company Official Equipment	13.4	–	0.0	
264	Vehicles & Other Work Equipment				
	Motor Vehicles	13.8	13.5	–1.5	1985
	Other Work Equipment	5.6	15.9	–1.0	1985

#Except Accounts 235 and 262 which have an effective date of April 1, 1984.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for South Central Bell Telephone Company—Louisiana

Effective October 1, 1984#

Account No.	*Class or Subclass of Plant*	*VG Rate* %	*ELG Rate* %	*Net Salvage Rate* %	*First ELG Year*
212	Buildings	2.5	5.4	–0.1	1984
221	Central Office Equipment				
	Manual	9.7	–	–1.5	
	Step-by-Step	10.6	–	–0.4	
	Crossbar	22.6	–	–2.0	
	Non-Ded Circuit	7.5	14.4	0.2	1982
	DDS Circuit	9.0	14.4	–0.5	1982
	Radio	6.1	9.6	0.4	1982
	Electronic	5.5	8.0	–0.2	1982
231	Station Apparatus				
	Teletypewriter	13.7	–	–	
	Telephone & Miscellaneous	10.2	–	–	
	Radio	8.4	–	–	
232	Station Connections - Other	5.0	–	–	
234	Large Private Branch Exchanges				
	Electronic	11.8	–	–	
	Other	30.5	–	–	
	DDS	18.1	–	–	
235	Public Telephone Equipment	10.2	–	0.0	
241	Pole Lines	4.1	8.5	2.6	1982
242.1	Aerial Cable				
	Exchange	7.7	10.4	1.0	1982
	Toll	9.6	9.0	–2.1	1982
242.2	Underground Cable				
	Exchange	3.5	6.5	–0.1	1982
	Toll	4.1	6.7	–0.7	1982
242.3	Buried Cable				
	Exchange	5.6	6.6	0.3	1982
	Toll	4.0	6.8	0.0	1982
242.4	Submarine Cable	2.9	7.1	–0.1	1982
243	Aerial Wire				
	Exchange	5.8	25.6	4.3	1984
244	Underground Conduit	1.5	2.5	0.1	1982
261	Furniture & Office Equipment				
	Storeroom & Other	7.8	8.7	–0.3	1984
	Computer & AMA Systems	15.2	17.5	–0.1	1984
	Art Works	0.0	–	0.0	
262	Company Official Equipment	12.7	–	0.0	
264	Vehicles & Other Work Equipment				
	Motor Vehicles	11.8	13.3	–0.9	1984
	Other Work Equipment	6.1	21.7	–0.9	1984

#Except Accounts 235 and 262 which have an effective date of April 1, 1984.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for South Central Bell Telephone Company—Mississippi

Effective April 1, 1984#

Account No.	*Class or Subclass of Plant*	*VG Rate %*	*ELG Rate %*	*Net Salvage Rate %*	*First ELG Year*
212	Buildings	2.2	4.3	0.0	1984
221	Central Office Equipment				
	Step-by-Step	9.0	–	–0.1	
	Crossbar	18.3	–	–1.5	
	Non-Ded Circuit	6.9	13.6	0.0	1982
	DDS Circuit	10.7	13.6	–1.2	1982
	Radio	6.6	9.6	0.5	1982
	Electronic	6.7	8.4	–0.3	1982
231	Station Apparatus				
	Teletypewriter	7.8	–	–	
	Telephone & Miscellaneous	10.0	–	–	
	Radio	4.3	–	–	
232	Station Connections—Other	5.0	–	–	
234	Large Private Branch Exchanges				
	Electronic	13.4	–	–	
	Other	23.1	–	–	
	DDS	17.8	–	–	
235	Public Telephone Equipment	10.0	–	0.0	
241	Pole Lines	3.6	9.6	1.5	1982
242.1	Aerial Cable				
	Exchange	6.0	8.0	0.2	1982
	Toll	7.3	8.8	–1.2	1982
242.2	Underground Cable				
	Exchange	4.2	7.6	–1.0	1982
	Toll	3.8	6.9	–1.8	1982
242.3	Buried Cable				
	Exchange	5.4	6.5	0.2	1982
	Toll	3.7	6.8	0.0	1982
242.4	Submarine Cable	3.2	7.1	0.1	1982
243	Aerial Wire				
	Exchange	11.1	25.6	5.4	1984
244	Underground Conduit	1.5	2.5	0.1	1982
261	Furniture & Office Equipment				
	Storeroom & Other	6.3	11.6	–0.2	1984
	Computer & AMA Systems	14.3	17.5	–0.3	1984
	Art Works	0.0	–	0.0	
262	Company Official Equipment	8.9	–	0.0	
264	Vehicles & Other Work Equipment				
	Motor Vehicles	13.1	13.9	–1.3	1984
	Other Work Equipment	7.3	14.1	–1.7	1984

#Except Accounts 235 and 262 which have an effective date of April 1, 1984.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for South Central Bell Telephone Company—Tennessee

Effective January 1, 1985#

Account No.	*Class or Subclass of Plant*	*VG Rate* %	*ELG Rate* %	*Net Salvage Rate* %	*First ELG Year*
212	Buildings	2.3	4.2	0.0	1985
221	Central Office Equipment				
	Step-by-Step	9.2	–	–0.8	
	Crossbar	21.3	–	–1.8	
	Non-Ded Circuit	8.9	14.4	–0.7	1982
	DDS Circuit	8.8	14.3	–0.1	1982
	Radio	5.6	9.3	0.3	1982
	Electronic	5.5	7.7	0.1	1982
231	Station Apparatus				
	Teletypewriter	12.6	–	–	
	Telephone & Miscellaneous	10.2	–	–	
	Radio	8.0	–	–	
232	Station Connections—Other	5.0	–	–	
234	Large Private Branch Exchanges				
	Electronic	13.6	–	–	
	Other	33.4	–	–	
	DDS	17.7	–	–	
235	Public Telephone Equipment	10.2	–	0.0	
241	Pole Lines	4.4	8.9	2.5	1982
242.1	Aerial Cable				
	Exchange	5.3	8.0	–0.3	1982
	Toll	6.6	9.6	–1.4	1982
242.2	Underground Cable				
	Exchange	3.4	6.5	–0.7	1982
	Toll	5.5	8.8	–1.3	1982
242.3	Buried Cable				
	Exchange	4.3	5.1	0.0	1982
	Toll	5.4	8.6	0.1	1982
242.4	Submarine Cable	3.1	5.6	0.0	1982
243	Aerial Wire				
	Exchange	11.5	25.6	4.3	1985
244	Underground Conduit	1.5	2.5	0.1	1982
261	Furniture & Office Equipment				
	Storeroom & Other	5.3	8.2	–0.2	1985
	Computer & AMA Systems	16.0	17.5	–0.6	1985
	Art Works	0.0	–	0.0	
262	Company Official Equipment	12.1	–	0.0	
264	Vehicles & Other Work Equipment				
	Motor Vehicles	12.2	12.7	–1.4	1985
	Other Work Equipment	5.4	17.2	–1.1	1985

#Except Accounts 235 and 262 which have an effective date of April 1, 1984.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for The Southern New England Telephone Company

Effective January 1, 1985

Account No.	*Class or Subclass of Plant*	*VG Rate %*	*ELG Rate %*	*Net Salvage Rate %*	*First ELG Year*
212	Buildings	2.5	4.5	0.3	1985
221	Central Office Equipment				
	Manual	7.5	–	2.6	
	Step-by-Step	5.5	–	0.5	
	Crossbar	10.0	–	0.9	
	Non-Ded Circuit	7.1	10.1	0.7	1983
	DDS Circuit	13.7	16.5	–0.5	1983
	Radiotelephone	5.9	9.9	0.3	1983
	Analog Electronic	5.9	8.2	–0.1	1983
	Digital Electronic	5.4	7.9	0.0	1983
231	Station Apparatus				
	Teletypewriter	23.1	–	–0.4	
	Telephone & Miscellaneous	17.5	–	–1.5	
	Radio	3.6	–	–3.5	
232	Station Connections—Other	5.0	–	–	
234	Large Private Branch Exchanges				
	Electronic	19.2	–	–1.2	
	Other	32.3	–	0.6	
	DDS	27.5	–	–4.6	
235	Public Telephone Equipment	8.3	–	–0.1	
241	Pole Lines	2.6	5.1	2.4	1982
242.1	Aerial Cable	3.8	6.7	0.6	1982
242.2	Underground Cable	3.6	5.8	0.4	1982
242.3	Buried Cable	3.6	5.1	0.2	1982
242.4	Submarine Cable	2.7	4.7	0.0	1982
243	Aerial Wire	4.7	–	10.2	
244	Underground Conduit	1.8	2.8	0.2	1982
261	Furniture & Office Equipment				
	Storeroom & Other	6.3	8.9	–0.3	1985
	Computer	13.9	22.2	–1.2	1985
	Art Works	0.0	–	0.0	
262	Company Official Equipment	21.6	–	–0.7	
264	Vehicles & Other Work Equipment				
	Motor Vehicles	11.6	14.3	–1.2	1985
	Garage & MV Shop	3.9	9.0	0.0	1985
	Other Work Equipment	4.5	10.9	–0.1	1985

FCC 84-621

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

The Prescription of Revised Percentages of Depreciation pursuant to the Communications Act of 1934, as amended for:

Alascom, Inc.
General Telephone Company of the Southeast
General Telephone Company of the Southwest
The Mountain States Telephone and Telegraph Company
The Ohio Bell Telephone Company
Pacific Bell
United Inter-Mountain Telephone Company
Wisconsin Bell

ORDER

Adopted: December 10, 1984; Released: December 19, 1984

BY THE COMMISSION:

I. Introduction

1. The Communications Act of 1934, as amended, grants the Commission the authority to prescribe depreciation rates for common carriers and to revise these rates when it deems necessary. By this order we prescribe revised depreciation rates for the eight carriers listed above using the straight-line vintage group remaining-life and straight-line equal life group remaining-life procedures.

II. Background

A. Methods

2. We approved the use of these procedures in our final decision in *Property Depreciation*, Docket No. 20188, 83 FCC 2d 267 (1980),

reconsideration, 87 FCC 2d 916 (1981). The remaining-life procedures are designed to distribute the unrecovered cost of an account (including any reserve deficit or surplus) over its estimated average remaining life. The equal life group procedure was adopted to allow for depreciation at rates more representative of consumption of capital than that allowed by the use of the vintage group procedure which had been used exclusively prior to our decision in Docket No. 20188. In accordance with our decision in that Docket we implemented rates using these new procedures in the depreciation prescription orders, which we adopted beginning in 1981. This order represents a continuation of these procedures.

B. Review Procedures

3. For many years it has been our practice to review and revise depreciation rates for one-third of the major domestic telephone companies every year. Thus, every three years depreciation rates for all the major telephone companies are reviewed and revised as we find necessary. In our recent depreciation prescription orders (e.g., *Depreciation Rates*, 96 FCC 2d 257 (1983), *reconsideration*, FCC Order 84-505, released October 31, 1984), we discussed the increased volatility of depreciation rates using the new procedures (i.e., equal life group and remaining-life) and concluded it may be necessary to update the rates annually to keep them in line with accounting activity (i.e., plant additions, retirements, and net salvage). We also established streamlined study procedures whereby carriers could file for the annual update of rates in between complete reviews, using the same equipment life and salvage estimates that underlie prescribed rates. The carriers under consideration here filed for annual updates using these streamlined procedures.

4. Inasmuch as the rates under consideration are based primarily upon equipment life and salvage estimates underlying prescribed rates rather than revised estimates based upon new studies, much of the time and effort normally expended in a review was not required here. Furthermore, since these estimates had been discussed at length in prior three-way meetings,[1] it was not necessary to conduct such meetings during the current year. Instead, the questions that were raised during the review process were discussed in correspondence and telephone conversations.

5. Our staff reviewed the rate proposals submitted by the companies and found that, with two exceptions,[2] the rate proposals were based upon the life and salvage parameters underlying the currently prescribed rates,

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[1] It has been our practice to hold three-way meetings between representatives of the telephone carriers and the staffs of the respective state commissions and our Commission to discuss and resolve many of the issues raised in the carriers' depreciation rate filings.

[2] These exceptions are Wisconsin Bell's COE-Crossbar and United Inter-Mountain's Station Apparatus accounts. These accounts are discussed in detail in paragraphs 10, 11, 13, 14, and 15.

and the accounting activity that has occurred since the effective date of the prior studies. On September 14, 1984, our staff issued a public notice entitled, "Depreciation Rate Prescriptions Proposed For Domestic Telephone Companies." This notice summarized the carriers' proposals for revised depreciation rates and the changes in depreciation expense that would result if those proposed depreciation rates were approved. On September 18, 1984, our staff transmitted to each company and the respective state commissions a copy of the public notice.

III. Issues

6. No comments were submitted regarding the rate filings of Alascom, General Telephone Company of the Southwest, General Telephone Company of the Southeast, or Mountain Bell. Six parties submitted comments regarding the rate filings of Ohio Bell, Pacific Bell, United Inter-Mountain (United), or Wisconsin Bell. Many of these comments were general in nature and raised issues that we addressed in prior prescription orders. Because we have already dealt with these issues in prior orders,[3] and because the commenting parties have presented no new facts that would justify reconsideration of our prior decisions, we have not addressed them in this order. Instead, we focus here on the new substantive issues raised by the parties.

A. Amortization

7. In two of our 1983 depreciation prescription orders, e.g., *Depreciation Rates, supra,* we acknowledged that certain dying accounts may require special amortization treatment if either of the following conditions exists: (1) all of the plant investment has retired leaving a significant residue in the reserve; or (2) the plant investment is rapidly decreasing and a large reserve deficiency exists such that the application of remaining-life procedures alone would result in extremely high and volatile depreciation rates.

8. In its review of rates for the eight carriers under consideration here, our staff found that these conditions exist for the accounts listed on the following table. It, therefore, recommended that amortizations should be used to resolve the associated reserve problems.

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[3] For example, the respondents in this proceeding commented against the use of projection lives, Gompertz-Makeham survivor curves, composite ELG rates, and the remaining-life and ELG methods. We have discussed all of these issues and made decisions regarding them in prior depreciation prescription orders, see, e.g., *Depreciation Rates, supra.*

Company	*State*	*Account*
Alascom	Alaska	COE-Auto Message Recording
General of the Southwest	New Mexico	COE-Manual Switching
General of the Southwest	New Mexico	COE-Automatic Switching
General of the Southwest	New Mexico	COE-Auto Message Recording
General of the Southwest	Oklahoma	COE-Manual Switching
Pacific Bell	California	COE-Manual Switching
Wisconsin Bell	Wisconsin	COE-Crossbar

9. Inasmuch as the proposed amortizations are in accordance with our stated policy and no commenting parties dispute the need for the amortizations or the proposed amortization periods, we approve the amortizations shown in the Appendix to this order.

B. Wisconsin Bell COE-Crossbar

10. In *Depreciation Rates, supra,* we prescribed rates for Wisconsin Bell. In that order, as a general policy, we also directed the staff to perform annual updates of rates as it deems necessary. These updated rates were to be based upon life and salvage factors underlying the prescribed rates. In its initial filing Wisconsin Bell proposed a revised rate for its COE-Crossbar account based upon a new life estimate which is inconsistent with its prescribed rate. Thus, Wisconsin Bell's proposal did not comport with our annual update policy. Accordingly, we reject it, and, in accordance with our annual update policy, we adopt a rate determined by updating Wisconsin Bell's prescribed factors with the accounting activity that has occurred since its 1983 study.

11. Both Wisconsin Bell and the Wisconsin Commission express their concern that, if Wisconsin Bell's depreciation expense is not increased substantially in 1984, its COE-Crossbar reserve would likely become negative. Our staff reviewed Wisconsin Bell's COE-Crossbar plant and reserve accounts and found that, with the continued use of the prescribed rate, a negative reserve is likely. Our staff also found that by amortizing the COE-Crossbar reserve deficiency over a two year period, as the Wisconsin Commission recommends, a negative reserve can be averted. We do not agree, however, with the Wisconsin Commission proposal to determine the reserve deficiency effective December 31, 1985. Since all parties agree that the amortization should begin January 1, 1984, and since the effective date of the update study is January 1, 1984, we believe that the reserve deficiency should also be computed effective January 1, 1984. We find that the Wisconsin Commission recommendation to amortize the COE-Crossbar reserve deficiency over a two year period comports with our policy of writing reserve deficiencies off in a timely manner. We, therefore, approve this procedure using a reserve deficiency established as of January 1, 1984, and the life and salvage factors determined as described in paragraph 10.

C. Jurisdiction Over Wisconsin Bell

12. The Wisconsin Public Service Commission contends that, as a result of the Modification of Final Judgement in the *United States v. American Telephone and Telegraph Company*, 552 F. Supp. 131 (D.D.C.) *aff'd. sub nom Maryland v. United States*, 103 S. Ct. 1240 (1983), Wisconsin Bell is no longer subject to FCC depreciation prescription orders. We believe that we have the authority to prescribe depreciation rates for the divested BOCs, including Wisconsin Bell. *Virginia State Corporation Commission v. FCC*, 737 F. 2d 288 (4th cir. 1984); *NARUC v. FCC*, No. 83-1354 (D.C. Cir., October 26, 1984). Nevertheless, in order to comprehensively deal with the question of the extent of our jurisdiction over the divested BOCs, we plan to initiate a proceeding in the near future to resolve outstanding factual and legal jurisdictional issues which have arisen in several contexts.

D. United Inter-Mountain Station Apparatus

13. The Virginia State Corporation Commission questions the rates proposed by United for its Station Apparatus subaccounts. It contends that United has incorrectly recorded a large inventory adjustment on its books of account as an ordinary retirement. The Virginia Commission contends that United should have recorded the inventory adjustment as an extraordinary retirement. It argues that this incorrect accounting treatment resulted in a deflated depreciation reserve and, thus, an incorrect remaining-life depreciation rate.

14. Our rules[4] state that extraordinary retirement accounting should be used if the following two criteria are met: (1) the cause of the retirement is not a recognized factor in establishing the depreciation rate; and (2) the charging of the retirement against the reserve would result in the undue depletion of the reserve. Regarding the first criterion, at no time during our review of United's rates for these accounts did United inform us that significant variances between its continuing property records and its in-service equipment exist or that an inventory was in process that would likely result in a large write-off of its plant. As a result, prior depreciation rates have not been determined with recognition that such a write-off of plant should occur in ordinary course. Regarding the second criterion, if the inventory adjustment were booked as an ordinary retirement, the reserve balance for these subaccounts would drop by more than 80%. This would clearly constitute the undue depletion of the reserve. Because both criteria are met, we agree with the Virginia Commission that extraordinary retirement accounting should be applied.

15. In its review of United's proposals our staff found that United's life and salvage estimates for the Station Apparatus subaccounts are

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[4] See 47 C.F.R. § 31-02.83.

consistent with its currently prescribed rates. We, therefore, establish rates based upon United's life and salvage estimates and the reserve ratios adjusted to reflect the extraordinary retirement accounting discussed in paragraph 14.

E. Effective Dates

16. Prior to our decision in Docket No. 20188 depreciation rates were usually prescribed retroactively to the beginning of the year in which they were filed. This appeared to be a reasonable practice because the rates were based on depreciation studies made as of the beginning of the review year. However, the rapid increase in depreciation expenses and the more complex interaction of federal and state regulatory actions have prompted us, in recent years, to allow effective dates for new depreciation rates at any time between January of the filing year and the first month following the release of the prescription order. The companies under consideration have all filed for effective dates consistent with our recent order (i.e., between January 1, 1984 and January 1, 1985). While we would prefer the effective date of new rates to coincide with the study date, i.e., the beginning of the filing year, the complex interaction of federal and state regulatory actions continues to mandate a flexible approach. Therefore, we shall again grant the effective dates proposed by the companies.

F. Conclusion

17. Having considered the responses to the public notice, the recommendations of the staff, and the carriers' proposals, we adopt the rates and amortization amounts listed in the Appendix.

IV. Ordering Clause

18. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 201-205 and 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§151, 154(i), 201-205 and 220(b), That the percentages of depreciation and amortization amounts set forth in the Appendix to this order are prescribed effective on the dates listed.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for Alascom, Inc.
Effective January 1, 1984

Account No.	*Class or Subclass of Plant*	*Average Remaining Life*	*Future Net Salvage* %	*Reserve Ratio* %	*Remaining Life Rate* %
212	Buildings				
	Buildings	29.0	14.0	16.7	2.4
	Towers	16.8	–42.0	31.1	6.6
221	Central Office Equipment				
	Manual Switching	17.1	–5.0	9.1	5.6
	Automatic Switching	5.1	–5.0	27.0	15.3
	Automatic Message Recording[1]	–	–	–	
	Automatic Sw (Telex)	11.2	–5.0	38.9	5.9
	Circuit	9.3	8.0	18.2	7.9
	Other	6.0	9.4	29.3	10.2
231	Station Apparatus				
	Telephone	5.2	10.0	17.3	14.0
	Radio	3.6	–	–3.5	
234	Large Private Branch Exchange	5.6	10.0	–5.2	17.0
235	Public Telephone Equipment				
	Coins	5.2	10.0	46.7	8.3
	Coinless	5.2	10.0	71.2	3.6
241	Pole Lines	11.3	–25.0	–63.5	16.7
242.1	Aerial Cable	9.9	10.0	22.8	6.8
242.2	Underground Cable	9.9	0.0	99.9	0.0
242.3	Buried Cable	17.7	–5.0	4.7	5.7
242.4	Submarine Cable	5.1	–2.0	67.0	6.9
244	Underground Conduit	26.3	–3.0	46.8	2.1
	Earth Station	6.7	5.0	29.7	9.8
	Satellite	7.3	0.0	12.5	12.0
261	Furniture & Office Equipment				
	Furniture & Office Equip.	12.8	20.0	12.8	5.2
	Data Handling	2.9	10.0	43.0	16.2
	Mini Computers	3.0	15.0	37.8	15.7
	Data Base Admin. Computer	3.1	10.0	18.2	23.2
262	Company Official Equipment	5.0	10.0	29.2	12.2
264	Vehicles & Other Work Equipment				
	Other Work Equipment	8.2	13.0	54.3	4.0
	Motor Vehicles	8.7	13.0	37.4	5.7
	Aircraft	3.5	40.0	32.1	8.0

[1] Amortize debit reserve balance of $1,066,056 over 24 months.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for General Telephone Company Of The Southeast - South Carolina

Effective January 1, 1985#

Account No.	*Class or Subclass of Plant*	*Average Remaining Life*	*Future Net Salvage %*	*Reserve Ratio %*	*Remaining Life Rate %*	*First ELG Year*
212	Buildings	31.0	6.0	20.1	2.4	1984
221	Central Office Equipment					
	Manual Sw (Digital)	17.8	0.0	47.7	2.9	–
	Automatic Sw (Electro-Mech)	2.7	2.0	36.6	22.7	–
	Digital Switching	16.1	5.0	6.1	5.5	1983
	Auto Msg Rec (Non-Digital)	2.0	0.0	63.3	18.4	–
	Auto Msg Rec (Digital)	16.9	5.0	6.3	5.2	1983
	Circuit	12.3	15.0	23.0	5.0	1983
	Radio	13.8	–5.0	23.1	5.9	1983
231	Station Apparatus					
	Telephones	6.0	3.0	24.0	12.2	–
	Teletypewriter	3.4	3.0	57.0	11.8	–
234	Large Private Branch Exchanges	7.2	4.0	24.8	9.9	–
235	Public Telephone Equipment				12.2	–
241	Pole Lines	12.2	–30.0	35.7	7.7	1983
242.1	Aerial Cable	13.6	–16.0	31.3	6.2	1983
242.2	Underground Cable	23.0	–14.0	17.7	4.2	1983
242.3	Buried Cable	18.8	–5.0	19.3	4.6	1983
242.4	Submarine Cable	10.5	–5.0	19.0	8.2	1983
243	Aerial Wire	6.7	–60.0	–215.2	56.0	–
244	Underground Conduit	44.0	–1.0	17.7	1.9	–
261	Furniture & Office Equipment					
	Other than Machines	10.2	5.0	14.0	7.9	1984
262	Company Official Equipment				11.3	–
264	Vehicles & Other Work Equipment					
	Motor Vehicles	5.8	19.0	45.3	6.3	1984
	Vehicle Shop Equipment	12.6	2.0	12.9	6.8	1984
	Tools & Other Work Equipment	11.9	3.0	21.9	6.3	1984

#Except accounts 235 and 262 which have an effective date of April 1, 1984.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for General Telephone Of The Southwest — Arkansas

Effective December 1, 1984#

Account No.	*Class or Subclass of Plant*	*Average Remaining Life*	*Future Net Salvage* %	*Reserve Ratio* %	*Remaining Life Rate* %	*First ELG Year*
212	**Buildings**	–	–	–	**3.0**	**1984**
221	**Central Office Equipment**					
	Analog Electronic	**13.8**	**4.0**	**0.0**	**7.1**	**1983**
	Digital Electronic	**16.7**	**0.0**	**0.0**	**6.0**	**1983**
	T.S.P.S.	**13.8**	**3.0**	–	**7.0**	**1984**
	Manual Switching	**2.5**	**2.0**	**39.8**	**23.3**	–
	Automatic Switching	**4.8**	**–4.0**	**44.0**	**12.5**	–
	Automatic Message Recording	**3.5**	**0.0**	**36.6**	**18.1**	–
	Circuit	**11.2**	**22.0**	**19.3**	**5.2**	**1983**
	Radio	**12.7**	**1.0**	**47.2**	**4.1**	**1983**
231	**Station Apparatus**					
	Telephone				**12.8**	–
	Teletypewriter				**6.8**	–
	Radiotelephone				**3.7**	–
	Small PBX				**7.9**	–
234	**Large Private Branch Exchanges**					
	Digital				**10.2**	–
	Other				**20.6**	–
235	**Public Telephone Equipment**				**10.5**	–
241	**Pole Lines**	**14.8**	**–60.0**	**17.0**	**9.7**	**1983**
	Microwave & Mobile Towers	**13.9**	**–15.0**	**0.0**	**8.3**	**1983**
242.1	**Aerial Cable**	**16.9**	**–25.0**	**31.0**	**5.6**	**1983**
242.2	**Underground Cable**	**24.0**	**–16.0**	**21.7**	**3.9**	**1983**
242.3	**Buried Cable**	**18.0**	**–5.0**	**18.5**	**4.8**	**1983**
242.4	**Submarine Cable**	**18.2**	**0.0**	**0.0**	**5.5**	**1983**
243	**Aerial Wire**	**7.9**	**–128.0**	**–25.9**	**32.1**	–
244	**Underground Conduit**	**41.0**	**–5.0**	**22.7**	**2.0**	**1983**
261	**Furniture & Office Equipment**					
	Other than Machines	**15.8**	**2.0**	**22.1**	**4.8**	**1984**
	Machines	**8.3**	**2.0**	**23.4**	**9.0**	**1984**
262	**Company Official Equipment**					
	Large PBX	–	–	–	**10.5**	–
	Apparatus	–	–	–	**9.3**	–
264	**Vehicles & Other Work Equipment**					
	Passenger Cars	**3.4**	**16.0**	**28.4**	**16.4**	**1984**
	Pickups & Light Trucks	**3.6**	**18.0**	**49.4**	**9.1**	**1984**
	Heavy Trucks	**3.7**	**17.0**	**54.6**	**7.7**	**1984**
	Special Motor Vehicle Equip.	**3.4**	**14.0**	**43.4**	**12.5**	**1984**
	Trucks, Tractors & Trailers used by Central Supply	**8.0**	**4.0**	**0.0**	**12.0**	**1984**
	Trucks, Tractors & Trailers used by Area Cable Const.	**9.0**	**4.0**	**0.0**	**10.7**	**1984**
	Vehicle Shop Equipment	**8.3**	**2.0**	**52.4**	**5.5**	**1984**
	Tools & Other Work Equipment	**13.1**	**4.0**	**28.7**	**5.1**	**1984**
	Trailers	**14.5**	**17.0**	**57.1**	**1.8**	**1984**
	Mobile Tools	**4.7**	**18.0**	**44.7**	**7.9**	**1984**
	Aircraft	**3.7**	**50.0**	**0.0**	**13.5**	**1984**

#Except accounts 235 and 262 which have an effective date of May 1, 1984.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for General Telephone Of The Southwest — New Mexico

Effective September 1, 1984#

Account No.	*Class or Subclass of Plant*	*Average Remaining Life*	*Future Net Salvage* %	*Reserve Ratio* %	*Remaining Life Rate* %	*First ELG Year*
212	Buildings	–	–	–	2.9	1984
221	Central Office Equipment					
	Analog Electronic	17.6	5.0	10.6	4.8	1983
	Digital Electronic	17.2	5.0	0.7	5.5	1983
	T.S.P.S.	14.0	3.0	1.5	6.8	1984
	Manual Switching[1]	–	–	–	–	–
	Automatic Switching[1]	–	–	–	–	–
	Automatic Message Recording[1]	–	–	–	–	–
	Circuit	10.8	11.0	22.5	6.2	1983
	Radio	10.1	1.0	21.6	7.7	1983
231	Station Apparatus					
	Telephone	–	–	–	10.6	–
	Teletypewriter	–	–	–	2.8	–
	Radiotelephone	–	–	–	5.5	–
	Small PBX	–	–	–	8.8	–
234	Large Private Branch Exchanges					
	Digital	–	–	–	9.6	–
	Other	–	–	–	12.3	–
235	Public Telephone Equipment	–	–	–	9.0	–
241	Pole Lines	20.0	–65.0	44.3	6.0	1983
	Microwave & Mobile Towers	13.9	–13.0	51.5	4.4	1983
242.1	Aerial Cable	15.4	–17.0	24.1	6.0	1983
242.2	Underground Cable	26.0	–18.0	10.6	4.1	1983
242.3	Buried Cable	21.0	–5.0	15.7	4.3	1983
242.4	Submarine Cable	18.2	–	–	5.5	1983
243	Aerial Wire	6.9	–47.0	–10.1	22.8	–
244	Underground Conduit	46.0	–5.0	17.6	1.9	1983
261	Furniture & Office Equipment					
	Other than Machines	15.8	4.0	20.3	4.8	1984
	Machines	8.1	2.0	13.6	10.4	1984
262	Company Official Equipment					
	Large PBX	–	–	–	9.6	–
	Apparatus	–	–	–	6.9	–
264	Vehicles & Other Work Equipment					
	Passenger Cars	3.4	16.0	48.2	10.5	1984
	Pickups & Light Trucks	3.6	18.0	41.2	11.3	1984
	Heavy Trucks	3.7	17.0	55.8	7.4	1984
	Special Motor Vehicle Equip.	3.4	14.0	39.1	13.8	1984
	Trucks, Tractors & Trailers used by Central Supply	8.0	4.0	–	12.0	1984
	Trucks, Tractors & Trailers used by Area Cable Const.	9.0	4.0	–	10.7	1984
	Vehicle Shop Equipment	6.6	2.0	35.1	9.5	1984
	Tools & Other Work Equipment	13.1	4.0	35.3	4.6	1984
	Trailers	10.6	17.0	84.6	0.0	1984
	Mobile Tools	3.5	18.0	44.8	10.6	1984
	Aircraft	3.7	50.0	–	13.5	1984

#Except accounts 235 and 262 which have an effective date of May 1, 1984.

[1] Net book cost to be amortized over 36 months.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for General Telephone Of The Southwest — Oklahoma

Effective December 1, 1984#

Account No.	*Class or Subclass of Plant*	*Average Remaining Life*	*Future Net Salvage* %	*Reserve Ratio* %	*Remaining Life Rate* %	*First ELG Year*
212	Buildings	–	–	–	3.1	1984
221	Central Office Equipment					
	Analog Electronic	16.6	5.0	11.2	5.0	1983
	Digital Electronic	17.4	5.0	6.2	5.1	1983
	T.S.P.S.	13.6	3.0	0.0	7.1	1984
	Manual Switching[1]	–	–	–	–	–
	Automatic Switching	3.3	–1.0	42.2	17.8	–
	Automatic Message Recording	4.3	0.0	19.2	18.8	–
	Circuit	11.1	20.0	22.9	5.1	1983
	Radio	12.7	1.0	57.3	3.3	1983
231	Station Apparatus					
	Telephone	–	–	–	13.2	–
	Teletypewriter	–	–	–	6.7	–
	Radiotelephone	–	–	–	0.3	–
	Small PBX	–	–	–	4.2	–
234	Large Private Branch Exchanges					
	Digital	–	–	–	9.6	–
	Other	–	–	–	20.2	–
235	Public Telephone Equipment	–	–	–	10.8	–
241	Pole Lines	17.3	–60.0	29.5	7.5	1983
	Microwave & Mobile Towers	13.9	–13.0	80.0	2.4	1983
242.1	Aerial Cable	17.8	–24.0	26.5	5.5	1983
242.2	Underground Cable	26.0	–14.0	11.0	4.0	1983
242.3	Buried Cable	19.0	–5.0	19.7	4.5	1983
242.4	Submarine Cable	18.2	0.0	49.7	2.8	1983
243	Aerial Wire	5.0	–78.0	–40.0	43.6	–
244	Underground Conduit	50.0	–10.0	10.7	2.0	1983
261	Furniture & Office Equipment					
	Other than Machines	15.0	2.0	30.4	4.5	1984
	Machines	8.1	2.0	31.4	8.2	1984
262	Company Official Equipment					
	Large PBX	–	–	–	9.6	–
	Apparatus	–	–	–	9.3	–
264	Vehicles & Other Work Equipment					
	Passenger Cars	3.4	16.0	44.9	11.5	1984
	Pickups & Light Trucks	3.6	18.0	48.8	9.2	1984
	Heavy Trucks	3.7	17.0	55.6	7.4	1984
	Special Motor Vehicle Equip.	3.4	14.0	48.7	11.0	1984
	Trucks, Tractors & Trailers used by Central Supply	8.0	4.0	–	12.0	1984
	Trucks, Tractors & Trailers used by Area Cable Const.	9.0	4.0	72.6	2.6	1984
	Vehicle Shop Equipment	6.6	2.0	37.9	9.1	1984
	Tools & Other Work Equipment	13.1	4.0	29.5	5.1	1984
	Trailers	10.6	17.0	30.1	5.0	1984
	Mobile Tools	3.5	18.0	26.4	15.9	1984
	Aircraft	3.7	50.0	0.0	13.5	1984

#Except accounts 235 and 262 which have an effective date of May 1, 1984.

[1] Net book cost to be amortized over 36 months.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for General Telephone Of The Southwest — Texas

Effective September 1, 1984#

Account No.	*Class or Subclass of Plant*	*Average Remaining Life*	*Future Net Salvage* %	*Reserve Ratio* %	*Remaining Life Rate* %	*First ELG Year*
212	Buildings	–	–	–	2.8	1983
221	Central Office Equipment					
	Analog Electronic	15.7	4.0	12.0	5.4	1983
	Digital Electronic	18.4	0.0	3.8	5.2	1983
	T.S.P.S.	14.5	3.0	15.2	5.6	1983
	Manual Switching	0.9	3.0	48.3	54.1	–
	Automatic Switching	2.7	–2.0	49.5	19.4	–
	Automatic Message Recording	1.7	0.0	47.4	30.9	–
	Circuit	12.0	18.0	21.0	5.1	1983
	Radio	12.7	1.0	30.2	5.4	1983
231	Station Apparatus					
	Telephone	–	–	–	9.5	–
	Teletypewriter	–	–	–	8.7	–
	Radiotelephone	–	–	–	3.8	–
	Small PBX	–	–	–	12.2	–
234	Large Private Branch Exchanges					
	Digital	–	–	–	10.3	–
	Other	–	–	–	37.9	–
235	Public Telephone Equipment	–	–	–	8.7	–
241	Pole Lines	17.3	–60.0	21.5	8.0	1983
	Microwave & Mobile Towers	13.9	–13.0	30.8	5.9	1983
242.1	Aerial Cable	19.9	–21.0	22.9	4.9	1983
242.2	Underground Cable	31.0	–13.0	14.7	3.2	1983
242.3	Buried Cable	21.0	–5.0	14.3	4.3	1983
242.4	Submarine Cable	18.2	0.0	42.0	3.2	1983
243	Aerial Wire	6.1	–71.0	–21.5	31.6	–
244	Underground Conduit	46.0	–10.0	17.6	2.0	1983
261	Furniture & Office Equipment					
	Other than Machines	15.0	2.0	26.6	4.8	1983
	Machines	6.6	2.0	19.2	11.9	1983
262	Company Official Equipment					
	Large PBX	–	–	–	11.3	–
	Apparatus	–	–	–	8.9	–
264	Vehicles & Other Work Equipment					
	Passenger Cars	3.4	16.0	44.6	11.6	1983
	Pickups & Light Trucks	3.6	18.0	47.1	9.7	1983
	Heavy Trucks	3.7	17.0	53.7	7.9	1983
	Special Motor Vehicle Equip.	3.4	14.0	50.3	10.5	1983
	Trucks, Tractors & Trailers used by Central Supply	8.0	4.0	98.3	0.0	1983
	Trucks, Tractors & Trailers used by Area Cable Const.	9.0	4.0	69.9	2.9	1983
	Vehicle Shop Equipment	6.6	2.0	32.6	9.9	1983
	Tools & Other Work Equipment	13.1	4.0	35.8	4.6	1983
	Trailers	10.6	17.0	37.1	4.3	1983
	Mobile Tools	3.5	18.0	27.5	15.6	1983
	Aircraft	3.7	50.0	30.0	5.4	1983

#Except accounts 235 and 262 which have an effective date of May 1, 1984.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for Mountain Bell Telephone Company — Idaho

Effective June 1, 1984#

Account No.	*Class or Subclass of Plant*	*VG Rate* %	*Net Salvage Rate* %
221	Central Office Equipment		
	Step-by-Step	11.0	+0.4
	Crossbar	16.2	0.0
235	Public Telephone Equipment	11.3	–0.2
262	Company Official Equipment		
	Station Apparatus	14.8	–0.2
	PBX and Key Systems	12.9	–0.4

#Except accounts 235 and 262 which have an effective date of April 1, 1984.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for Mountain Bell Telephone Company — New Mexico

Effective January 1, 1984#

Account No.	*Class or Subclass of Plant*	*VG Rate* %	*Net Salvage Rate* %
221	**Central Office Equipment**		
	Step-by-Step	**12.0**	**0.1**
	Crossbar	**23.2**	**0.7**
235	**Public Telephone Equipment**	**11.7**	**–0.4**
262	**Company Official Equipment**		
	Station Apparatus	**14.9**	**0.4**
	PBX and Key Systems	**11.7**	**–0.4**

#Except accounts 235 and 262 which have an effective date of May 1, 1984.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for Mountain Bell Telephone Company — Utah

Effective March 1, 1984#

Account No.	*Class or Subclass of Plant*	*VG Rate* %	*Net Salvage Rate* %
221	**Central Office Equipment**		
	Step-by-Step	**13.0**	**0.2**
	Crossbar	**16.8**	**0.1**
235	**Public Telephone Equipment**	**12.5**	**-0.4**
262	**Company Official Equipment**		
	Station Apparatus	**19.2**	**-0.3**
	PBX and Key Systems	**12.9**	**-0.5**

#Except accounts 235 and 262 which have an effective date of April 1, 1984.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for Ohio Bell

Effective January 1, 1984

Account No.	*Class or Subclass of Plant*	*VG Rate* %	*ELG Rate* %	*Net Salvage Rate* %	*First ELG Year*
212	Buildings	2.6	3.4	–0.2	1983
221	Central Office Equipment				
	Manual	18.4	–	5.1	–
	Step-by-Step	15.7	–	2.7	–
	Crossbar	18.8	–	1.8	–
	Non-Ded. Circuit	8.0	14.3	–0.3	1983
	DDS Circuit	5.6	13.4	0.0	1983
	Radio	5.0	14.4	–0.3	1983
	Electronic	5.7	8.1	–0.3	1983
231	Station Apparatus				
	Teletypewriter	11.2	–	0.1	–
	Telephone & Miscellaneous	14.4	–	–0.7	–
	Radio	10.4	–	–1.3	–
234	Large Private Branch Exchanges				
	Electronic	12.7	–	–2.0	–
	Other	19.0	–	3.0	–
	DDS	15.8	–	–0.2	–
235	Public Telephone Equipment	14.4	–	–0.7	–
241	Pole Lines	3.1	7.3	2.1	1982
242.1	Aerial Cable				
	Exchange	4.6	5.6	0.5	1982
	Toll	5.1	9.5	–4.2	1982
242.2	Underground Cable				
	Exchange	3.4	5.5	–0.5	1982
	Toll	2.5	5.9	–1.7	1982
242.3	Buried Cable				
	Exchange	3.0	4.7	0.2	1982
	Toll	2.5	3.6	0.2	1982
242.4	Submarine Cable				
	Exchange	1.5	4.1	1.9	1982
	Toll	3.8	4.2	1.8	1982
243	Aerial Wire	14.0	–	16.5	–
244	Underground Conduit	1.4	1.5	0.1	1982
261	Furniture & Office Equipment				
	Furniture	3.8	9.0	–0.1	1983
	Computer	12.3	15.1	–1.1	1983
	Art Works	0.0	–	0.0	–
262	Company Official Equipment				
	Teletypewriter	11.2	–	0.1	–
	Telephone & Miscellaneous	14.4	–	–0.7	–
	Radio	10.4	–	–1.3	–
	PBX — Electronic	12.7	–	–2.0	–
	PBX — Other	19.0	–	3.0	–
	PBX — DDS Equipment	15.8	–	–0.2	–
264	Vehicles & Other Work Equipment				
	Motor Vehicles	11.9	15.0	–3.7	1983
	Tools	6.2	15.3	–0.8	1983

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for Pacific Bell

Effective July 1, 1984

Account No.	*Class or Subclass of Plant*	*VG Rate %*	*ELG Rate %*	*Net Salvage Rate %*	*First ELG Year*
212	Buildings	2.1	5.1	–0.1	1984
221	Central Office Equipment				
	Manual[1]	–	–	–	–
	Step-by-Step	24.2	–	2.3	–
	Crossbar	15.5	–	0.9	–
	Non-Ded. Circuit	6.6	8.7	0.0	1983
	DDS Circuit	8.1	11.1	0.2	1983
	Radio	5.4	8.5	0.1	1983
	Electronic	4.5	7.4	–0.3	1983
231	Station Apparatus				
	Teletypewriter	15.5	–	–0.1	–
	Telephone & Miscellaneous	13.3	–	–5.8	–
	Radio	5.6	–	0.1	–
234	Large Private Branch Exchanges				
	Electronic	0.0	–	0.0	–
	Other	18.5	–	1.5	–
	DDS	16.3	–	–1.7	–
235	Public Telephone Equipment	13.3	–	–5.8	–
241	Pole Lines	3.1	7.2	2.5	1982
242.1	Aerial Cable				
	Exchange	4.0	6.8	1.0	1982
	Toll	4.7	9.7	–0.8	1982
242.2	Underground Cable				
	Exchange	2.3	4.5	0.2	1982
	Toll	2.7	3.8	–0.4	1982
242.3	Buried Cable				
	Exchange	3.2	5.7	0.6	1982
	Toll	2.6	4.0	0.4	1982
242.4	Submarine Cable	2.6	4.4	2.5	1982
243	Aerial Wire				
	Exchange	12.1	–	–1.3	–
	Toll	11.9	–	–1.7	–
244	Underground Conduit	1.6	2.0	0.4	1982
261	Furniture & Office Equipment				
	Furniture	3.7	7.6	–0.1	1984
	Computer & AMA	12.7	14.8	0.1	1984
	Art Works	0.0	–	0.0	–
262	Company Official Equipment				
	Teletypewriter	15.5	–	–0.1	–
	Telephone & Miscellaneous	13.3	–	–5.8	–
	Radio	5.6	–	0.1	–
	PBX — Other	18.5	–	1.5	–
	PBX — Electronic	0.0	–	0.0	–
	PBX — DDS Equipment	16.3	–	–1.7	–
	Key Systems	13.3	–	–5.8	–
264	Vehicles & Other Work Equipment	7.1	11.4	–1.0	1984

[1] Amortize net book balance over 12 months.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for United Inter-Mountain Telephone Company — Tennessee

Effective January 1, 1984

Account No.	*Class or Subclass of Plant*	*Average Remaining Life*	*Future Net Salvage* %	*Reserve Ratio* %	*Remaining Life Rate* %
212	**Buildings**	**29.0**	**0.0**	**21.6**	**2.7**
221	**Central Office Equipment**				
	Manual	**1.0**	**-2.0**	**97.2**	**4.8**
	Step-by-Step	**2.8**	**10.0**	**46.2**	**15.6**
	Crossbar	**5.5**	**9.0**	**29.6**	**11.2**
	Auto Switching ETS-4	**3.5**	**-1.0**	**38.5**	**17.9**
	Circuit	**14.4**	**12.0**	**24.6**	**4.4**
	Radio	**7.3**	**0.0**	**36.5**	**8.7**
	Mobile Radio	**–**	**–**	**–**	**10.0**
	Electronic	**19.1**	**0.0**	**4.0**	**5.0**
	AMR	**2.9**	**-1.0**	**47.5**	**18.4**
231	**Station Apparatus**				
	Telephone and Other	**4.4**	**15.0**	**24.6**	**13.7**
	Mobile Radiotelephone		**–**		**34.5**
	Subscr. Multiplex Equipment		**–**		**9.3**
234	**Large Private Branch Exchange**				
	Digital & Elec Stored	**5.8**	**5.0**	**35.5**	**10.3**
	Other	**2.4**	**-2.0**	**6.2**	**39.9**
235	**Public Telephone Equipment**	**7.2**	**2.0**	**31.4**	**9.3**
241	**Pole Lines**	**16.8**	**-20.0**	**34.3**	**5.1**
242.1	**Aerial Cable**	**19.1**	**2.0**	**26.4**	**3.7**
242.2	**Underground Cable**	**23.0**	**0.0**	**19.1**	**3.5**
242.3	**Buried Cable**	**17.2**	**-1.0**	**17.0**	**4.9**
242.4	**Submarine Cable**		**–**	**94.4**	**5.7**
243	**Aerial Wire**	**10.9**	**-50.0**	**60.6**	**8.2**
244	**Underground Conduit**	**40.0**	**0.0**	**20.9**	**2.0**
261	**Furniture & Office Equipment**				
	Furniture & Office Equip.	**15.4**	**6.0**	**25.1**	**4.5**
	Data Proc Computers	**–**	**–**	**20.3**	**17.2**
262	**Company Official Equipment**	**5.8**	**1.0**	**22.7**	**13.2**
264	**Vehicles & Other Work Equipment**	**6.3**	**15.0**	**42.3**	**6.8**
	Passenger Cars	**6.3**	**15.0**	**42.3**	**6.8**
	Light Trucks & Van	**6.3**	**15.0**	**36.6**	**7.7**
	Heavy Trucks	**6.3**	**15.0**	**41.5**	**6.9**
	Special Purpose Veh. & OWE	**–**	**–**	**68.3**	**5.6**

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for United Inter-Mountain Telephone Company — Virginia

Effective January 1, 1984

Account No.	*Class or Subclass of Plant*	*Average Remaining Life*	*Future Net Salvage* %	*Reserve Ratio* %	*Remaining Life Rate* %
212	Buildings	–	–	23.2	2.7
221	Central Office Equipment				
	Manual	1.0	-4.0	90.9	13.1
	Step-by-Step	3.8	3.0	58.8	10.1
	Crossbar	7.2	-5.0	39.8	9.1
	Circuit	10.7	10.0	36.8	5.0
	Radio	7.0	0.0	91.7	1.2
	Mobile Radio	–	–	0.0	10.0
	Electronic	19.1	0.0	10.1	4.7
	AMR	1.5	-1.0	55.0	30.7
231	Station Apparatus				
	Telephone & Other	4.9	15.0	24.6	12.3
	Subscr. Multiplex Equipment	–	–	–	9.3
234	Large Private Branch Exchange				
	Digital & Elec Stored	3.9	9.0	40.2	13.0
	Other	1.5	-2.0	15.8	57.5
235	Public Telephone Equipment	7.1	2.0	32.0	9.3
241	Pole Lines	18.3	-35.0	37.0	5.4
242.1	Aerial Cable	19.5	-5.0	30.0	3.8
242.2	Underground Cable	23.0	-5.0	20.7	3.7
242.3	Buried Cable	16.0	-1.0	16.8	5.3
242.4	Submarine Cable	–	–	110.4	–
243	Aerial Wire	10.0	-55.0	51.9	10.3
244	Underground Conduit	–	–	16.9	2.0
261	Furniture & Office Equipment				
	Furniture & Office Equip.	15.4	6.0	27.9	4.3
	Data Proc Computers	8.1	5.0	12.3	10.2
262	Company Official Equipment	5.5	3.0	26.7	12.8
264	Vehicles & Other Work Equipment				
	Passenger Cars	5.4	13.0	33.8	9.9
	Light Trucks & Van	5.4	13.0	49.6	6.9
	Heavy Trucks	5.4	13.0	37.4	9.2
	Special Purpose Veh. & OWE	–	–	60.9	3.7

FEDERAL COMMUNICATIONS COMMISSION

Schedule of Annual Percentages of Depreciation for Wisconsin Bell

Effective January 1, 1984#

Account No.	*Class or Subclass of Plant*	*VG Rate* %	*ELG Rate* %	*Net Salvage Rate* %	*First ELG Year*
212	**Buildings**	**2.4**	**3.1**	**0.0**	**1984**
221	**Central Office Equipment**				
	Manual	**-1.2**	**0.0**	**1.2**	**–**
	Step-by-Step	**34.9**	**0.0**	**4.6**	**–**
	Crossbar[1]	**12.7**	**–**	**0.0**	**–**
	Non-Ded. Circuit	**7.6**	**14.4**	**-0.4**	**1983**
	DDS Circuit	**8.0**	**10.8**	**0.0**	**1983**
	Radio	**5.7**	**9.0**	**-0.6**	**1983**
	Electronic	**5.8**	**7.7**	**-0.6**	**1983**
231	**Station Apparatus**				
	Teletypewriter	**15.3**	**–**	**-0.6**	**–**
	Telephone & Miscellaneous	**13.7**	**–**	**0.0**	**–**
	Radio	**7.3**	**–**	**-0.4**	**–**
232	**Station Connections - Other**	**5.0**	**–**	**–**	**–**
234	**Large Private Branch Exchanges**				
	Other	**38.6**	**–**	**0.1**	**–**
	DDS	**25.3**	**–**	**-11.3**	**–**
235	**Public Telephone Equipment**	**13.7**	**–**	**0.0**	**–**
241	**Pole Lines**	**3.5**	**9.5**	**1.4**	**1982**
242.1	**Aerial Cable**				
	Exchange	**5.4**	**7.7**	**0.2**	**1982**
	Toll	**4.4**	**8.3**	**-4.4**	**1982**
242.2	**Underground Cable**				
	Exchange	**3.1**	**5.3**	**-0.2**	**1982**
	Toll	**2.5**	**5.8**	**-1.4**	**1982**
242.3	**Buried Cable**				
	Exchange	**4.0**	**4.9**	**0.1**	**1982**
	Toll	**4.2**	**5.0**	**0.1**	**1982**
242.4	**Submarine Cable**	**4.0**	**6.0**	**0.1**	**1982**
243	**Aerial Wire**				
	Exchange	**45.2**	**–**	**16.2**	**–**
244	**Underground Conduit**	**1.5**	**1.7**	**0.1**	**1982**
261	**Furniture & Office Equipment**				
	Storeroom & Other	**6.2**	**6.7**	**-0.9**	**1984**
	Computers	**14.5**	**14.7**	**-0.7**	**1984**
	Art Works	**0.0**	**–**	**0.0**	**–**
262	**Company Official Equipment**	**13.5**	**–**	**-0.1**	**–**
264	**Vehicles & Other Work Equipment**				
	Motor Vehicles	**12.7**	**14.9**	**-1.3**	**1984**
	Other Work Equipment	**5.8**	**18.5**	**0.0**	**1984**

#Except accounts 235 and 262 which have an effective date of May 1, 1984.

[1] The January 1, 1984 reserve deficiency of 31,103,551 is to be amortized over a 2 year period; remaining life rates are continued for this account using the calculated reserve ratio.

FCC 84-622

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

The Prescription of Revised Percentages of Depreciation pursuant to the Communications Act of 1934, as amended for:

AT&T Communications (Interstate Division and twenty-two interexchange subsidiaries)
Bell Telephone Company of Pennsylvania
Diamond State Telephone Company
General Telephone Company of the Northwest
General Telephone Company of the Southeast
Hawaiian Telephone Company
The Mountain States Telephone and Telegraph Company
New Jersey Bell Telephone Company
Northwestern Bell Telephone Company
Pacific Northwest Bell Telephone Company
Southern Bell Telephone and Telegraph Company

ORDER

Adopted: December 10, 1984; Released: December 19, 1984

BY THE COMMISSION:

I. Introduction

1. The Communications Act of 1934, as amended, grants the Commission the authority to prescribe depreciation rates for common carriers. In our decision in CC Docket No. 82-681, FCC Order 83-457, released November 2, 1983, the Commission established two new accounts: Account No. 235, Public Telephone Equipment, and Account No. 262, Other Communications Equipment. By this order we prescribe depreciation rates for these new accounts for the thirty-three common carriers

listed above.[1]

II. Background

2. Because the Public Telephone Equipment and Other Communications Equipment accounts are new accounts, there is very little data available to establish rates, except for the estimates that underlie the prescribed rates for the accounts from which these investments were transferred.[2] Recognizing this, all of the carriers under consideration filed for rates based upon prescribed factors. The carriers' use of prescribed factors instead of new studies of life and salvage factors allowed our staff to streamline its review process. In addition, since the prescribed life and salvage factors had already been discussed at length in prior three-way meetings,[3] it was not necessary to conduct such meetings during the current year. Instead, the questions that were raised during the review process were discussed in correspondence and telephone conversations.

3. After reviewing the filings, on October 2, 1984, our staff issued a Public Notice entitled, "Depreciation Rate Prescriptions For Public Telephone and Other Communications Equipment," in which it solicited comments regarding the filings. On October 3, 1984, our staff transmitted a copy of this public notice and the rates proposed by each carrier to the carriers and their respective state commissions.

III. Issues

4. Responses to the public notice were submitted by six parties: Bell Atlantic, the Michigan Public Service Commission, the Minnesota Department of Public Service, the Minnesota Public Utilities Commission, the North Dakota Public Service Commission, and the Virginia State Corporation Commission. In the following paragraphs we discuss the issues raised by the commenting parties and the recommendations resulting from our staff's review of the carriers' filings.

A. AT&T Communications

5. AT&T proposed the use of only two distinct rates for its Interstate Division and all of its interexchange subsidiaries, one for its Public

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[1] We do not herein prescribe rates for these accounts for all the FCC-subject carriers because for some it has been accomplished in other prescription orders, and for others the accounting changes have been implemented such that previously prescribed rates still apply.

[2] Prior to our decision in Docket No. 82-681, public telephone equipment was included in Account No. 231, Station Apparatus, and other communications equipment was included in Account No. 231 and Account No. 234, Large PBX.

[3] It has been our practice to hold three-way meetings between representatives of the telephone carriers and the staffs of their respective state commissions and our Commission to discuss and resolve many of the issues raised in the carriers' depreciation rate filings.

Telephone Equipment account and one for its Other Communications Equipment account. It based its proposals on the average of all life and salvage factors which the Commission prescribed for telephone carriers in 1983. The Michigan Commission questioned AT&T Communications' use of nationwide average life and salvage estimates for all of its interexchange subsidiaries.[4] It argued that it would be better to use individually developed life estimates for each subsidiary. Since our initial depreciation prescription orders in the late 1940's, we have prescribed individual rates for each carrier and jurisdiction which were developed from studies of each carrier and jurisdiction's unique plant experience and expectations. These prescribed rates have varied considerably by jurisdiction because of the variations in the carriers' operations. As a result, we believe Michigan's concern is valid. However, because all of AT&T Communications' investment in Accounts No. 235 and 262 has been installed since divestiture,[5] there is no data available which to determine life and salvage variations by jurisdiction. We see little choice but to use nationwide average factors for these accounts at the present time. To do otherwise would impose an enormous burden on the companies far out of proportion to the value of assets in question. In the future as data for AT&T Communications' plant becomes available by jurisdiction, we direct the staff to reexamine this issue and to determine if life and salvage factors vary enough by jurisdiction to warrant individual rates.

6. Our staff studied AT&T Communications' filing and found that the life and salvage parameters which it proposed were consistent with nationwide average prescribed parameters for Account Nos. 231 and 234 except for the life estimate for Public Telephone Equipment. For Account No. 231 the nationwide average projection life was approximately nine years. AT&T proposed a twelve year projection life for public telephone equipment, however, to reflect the results of its most recent product life cycle studies. These studies show that the Public Telephone category of Account No. 231 is expected to have a life approximately one-third longer than that of the account as a whole. We find that, with this adjustment for public telephone equipment, AT&T's proposals are consistent with the

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[4] The North Dakota Public Service Commission also questions the use of AT&T's nationwide average proposal for its Other Communications Equipment account in North Dakota.

[5] AT&T Communications has no pre-divestiture public telephone equipment because all of the BOCs' Public Telephone Equipment remained with the BOCs as part of the Modification of Final Judgement in United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd. sub nom.* Maryland v. United States, 103 S. Ct. 1240 (1983). It has no pre-divestiture other communications equipment because all of the BOC investment in this type of equipment was transferred to AT&T Information Systems and has since been detariffed.

prescribed parameters and AT&T's most recent studies. Accordingly, we find its proposals to be reasonable.

B. Exchange Carriers

7. Our staff reviewed the remainder of the carriers' filings and found that, with two exceptions, their rate proposals were based upon the proper application of the prescribed rates or factors. Our staff found that General Telephone Company of the Southeast incorrectly computed the rate for its Other Communications Equipment account in Virginia due to a rounding error. The state concurs in this finding. In addition, our staff found that Southern Bell had applied out of date investment figures[6] in determining its rates for the Other Communications Equipment account. Our staff has corrected each of these rates and we adopt our staff's recommendations here.

8. Bell Atlantic supports the use of prescribed factors to determine the initial rates for these new accounts. However, it contends that changes in state and federal policy regarding competition in the public telephone market will lead to future decreases in equipment lives for the Public Telephone Equipment account. It, therefore, urges the Commission to review this issue and to prescribe the necessary changes in rates for this account outside the three-year review cycle. Although we are by no means certain that significant reductions in public telephone equipment lives are imminent,[7] we agree with Bell Atlantic that this matter does require scrutiny. As a result, we direct our staff to monitor the situation and if it determines that extreme changes in public telephone equipment lives are occurring, it should recommend changes in the rates for prescription even if it results in prescriptions outside the regular three-year prescription cycle.

9. The Minnesota Department of Public Service and Minnesota Public Utilities Commission recommend that Northwestern Bell divide its Other Communications Equipment account into subaccounts. Our rules do not require such a subdivision and we are not convinced it is warranted, inasmuch as the account is relatively small.[8] Nevertheless, we direct the staff to entertain discussion regarding this matter at the next Northwestern Bell three-way meeting.

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[6] Although the accounts were established on April 1, 1984, Southern Bell used January 1, 1983, figures in establishing its composite rates.

[7] As discussed in paragraph 6, AT&T's product life cycle studies show that public telephone equipment lives are expected to be approximately one-third longer than those of other telephone apparatus. Inasmuch as most of the carriers have proposed rates for public telephone equipment based upon prescribed factors for telephone apparatus, it could be argued that their proposed life estimates for public telephone equipment are too short.

[8] This account makes up only 1% of Northwestern Bell's depreciable plant investment.

10. Minnesota also questions the transfer of assets from plant-in-service to the supply account without a concomitant reserve transfer. It contends that, without a reserve transfer, the plant-in-service will be understated while the supply account will be overstated. According to our current rules,[9] however, the transfer of an asset from plant-in-service to the supply account calls for retirement accounting at gross book cost, not net book cost as Minnesota suggests. Such accounting will correctly result in the *overall* rate base being unchanged by the transfer.

C. Conclusion

11. Having considered the responses to the Public Notice, the recommendations of the staff, and the carriers' proposals, we adopt the depreciation rates and effective dates[10] listed in the Appendix.

IV. Ordering Clause

12. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 201-205 and 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§151, 154(i), 201-205 and 220(b), That the percentages of depreciation set forth in the Appendix to this order are prescribed effective on the dates listed.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[9] The detailed accounting treatment for such transfers is the subject of a pending Commission inquiry. See CC Docket No. 84-468, Notice of Inquiry, FCC 84-199, released May 16, 1984.

[10] These rates are to be effective retroactively to the dates at which the accounts were established.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for AT&T Communications IXD & 22 IXC Subsidiaries
Effective January 1, 1984

Account No.	*Class or Subclass of Plant*	*Depreciation Rate* %
235	Public Telephone Equipment	8.3
262	Other Communications Equipment	13.3

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
Bell Telephone Company of Pennsylvania
Effective May 1, 1984

Account No.	*Class or Subclass of Plant*	*Depreciation Rates Investment %*	*Net Salvage %*
235	Public Telephone Equipment	10.8	–0.3
262	Other Communications Equipment	10.4	–0.2

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for Diamond State Telephone Company
Effective May 1, 1984

Account No.	*Class or Subclass of Plant*	*Depreciation Rates Investment* %	*Net Salvage* %
235	Public Telephone Equipment	14.8	–0.1
262	Other Communications Equipment	18.8	0.1

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
General Telephone Company of the Northwest

Effective May 1, 1984

Jurisdiction	*Account No.*	*Class or Subclass of Plant*	*Depreciation Rate* %
Idaho	235	Public Telephone Equipment	
		Coin Telephone	12.9
		Coinless Telephone	12.9
	262	Other Communications Equipment	12.7
Montana	235	Public Telephone Equipment	
		Coin Telephone	13.4
		Coinless Telephone	13.4
	262	Other Communications Equipment	12.1
Oregon	235	Public Telephone Equipment	
		Coin Telephone	15.4
		Coinless Telephone	15.4
	262	Other Communications Equipment	12.8
Washington	235	Public Telephone Equipment	
		Coin Telephone	14.1
		Coinless Telephone	14.1
	262	Other Communications Equipment	13.2

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
General Telephone Company of the Southeast

Effective April 1, 1984

Jurisdiction	*Account No.*	*Class or Subclass of Plant*	*Depreciation Rate* %
Alabama	**235**	**Public Telephone Equipment**	
		Coin Telephone	**14.2**
		Coinless Telephone	**–**
	262	**Other Communications Equipment**	**12.6**
Georgia	**235**	**Public Telephone Equipment**	
		Coin Telephone	**12.8**
		Coinless Telephone	**–**
	262	**Other Communications Equipment**	**18.0**
North Carolina	**235**	**Public Telephone Equipment**	
		Coin Telephone	**12.8**
		Coinless Telephone	**–**
	262	**Other Communications Equipment**	**14.4**
Tennessee	**235**	**Public Telephone Equipment**	
		Coin Telephone	**12.5**
		Coinless Telephone	**–**
	262	**Other Communications Equipment**	**12.2**
Virginia	**235**	**Public Telephone Equipment**	
		Coin Telephone	**9.3**
		Coinless Telephone	**–**
	262	**Other Communications Equipment**	**15.7**
West Virginia	**235**	**Public Telephone Equipment**	
		Coin Telephone	**12.9**
		Coinless Telephone	**–**
	262	**Other Communications Equipment**	**15.7**

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for Hawaiian Telephone Company

Effective May 1, 1984

Account No.	*Class or Subclass of Plant*	*Depreciation Rate*
		%
235	Public Telephone Equipment	
	Coin Operated	13.4
	Coinless	13.4
262	Other Communications Equipment	11.4

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
The Mountain States Telephone and Telegraph Company

Effective April 1, 1984

Jurisdiction	*Account No.*	*Class or Subclass of Plant*	*Depreciation Rates Investment* %	*Depreciation Rates Net Salvage* %
Arizona	235	Public Telephone Equipment	12.4	–0.7
	262	Other Communications Equipment		
	262.1	Station Apparatus	13.7	–0.2
	262.2	PBX & Key System Intrasystems	12.8	–0.7
Colorado	235	Public Telephone Equipment	11.8	–0.3
	262	Other Communications Equipment		
	262.1	Station Apparatus	10.8	–0.1
	262.2	PBX & Key System Intrasystems	12.8	–0.4
Montana	235	Public Telephone Equipment	10.4	–0.3
	262	Other Communications Equipment		
	262.1	Station Apparatus	14.8	0.2
	262.2	PBX & Key System Intrasystems	14.9	0.1
Wyoming	235	Public Telephone Equipment	10.3	–0.4
	262	Other Communications Equipment		
	262.1	Station Apparatus	19.0	0.1
	262.2	PBX & Key System Intrasystems	10.7	–0.4

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for New Jersey Bell Telephone Company

Effective May 1, 1984

Account No.	*Class or Subclass of Plant*	*Depreciation Rate* %	*Net Salvage Rate* %
235	Public Telephone Equipment	8.3	–0.7
262	Other Communications Equipment	10.7	0.9

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for Northwestern Bell Telephone Company

Effective April 1, 1984

Jurisdiction	*Account No.*	*Class or Subclass of Plant*	*Depreciation Rates Investment*	*Depreciation Rates Net Salvage*
			%	%
Iowa	235	Public Telephone Equipment	12.7	0.4
	262	Other Communications Equipment	15.9	0.8
Minnesota	235	Public Telephone Equipment	12.4	0.3
	262	Other Communications Equipment	12.7	0.7
Nebraska	235	Public Telephone Equipment	11.6	0.3
	262	Other Communications Equipment	14.3	0.4
North Dakota	235	Public Telephone Equipment	10.5	–1.0
	262	Other Communications Equipment	16.0	0.5
South Dakota	235	Public Telephone Equipment	11.7	0.9
	262	Other Communications Equipment	20.2	–0.3

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for Pacific Northwest Bell Telephone Company

Effective April 1, 1984

Jurisdiction	*Account No.*	*Class or Subclass of Plant*	*Depreciation Rates Investment*	*Depreciation Rates Net Salvage*
			%	%
Idaho	235	Public Telephone Equipment	14.5	–0.1
	262	Other Communications Equipment	14.2	0.0
Oregon	235	Public Telephone Equipment	14.7	–1.0
	262	Other Communications Equipment	21.6	0.2
Washington	235	Public Telephone Equipment	13.0	–0.2
	262	Other Communications Equipment	18.2	0.4

FEDERAL COMMUNICATIONS COMMISSION

Schedule of Annual Percentages of Depreciation for Southern Bell Telephone and Telegraph Company

Effective April 1, 1984

Jurisdiction	*Account No.*	*Class or Subclass of Plant*	*Depreciation Rates Investment*	*Depreciation Rates Net Salvage*
			%	%
Florida	235	Public Telephone Equipment	12.4	–0.4
	262	Other Communications Equipment	12.5	–0.2
Georgia	235	Public Telephone Equipment	13.0	0.0
	262	Other Communications Equipment	11.1	0.2
North Carolina	235	Public Telephone Equipment	9.1	0.0
	262	Other Communications Equipment	10.6	0.1
South Carolina	235	Public Telephone Equipment	11.1	–0.3
	262	Other Communications Equipment	11.4	0.0

Distress Sale
Minority Ownership of Broadcast Facilities
Renewal of License, Conditional

Third request for distress sale relief conditionally granted. Proposed buyer controlled by 21% Hispanic owner. Sale meets standards of revised distress sale policy statement. 92 F.C.C. 2d 849 (1982). If conditions to sale not met, licensee must file supplemental renewal application, against which new applicants may file during 90-day "open window"; licensee would then be designated for comparative hearing.
—*Faith Center, Inc.*
BC Docket No. 80-730

FCC 84-613

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of **Faith Center, Inc.** **Hartford, Connecticut** **For Renewal of License**	**BC Docket** **No. 80-730** **File No.** **BRCT-348**

MEMORANDUM OPINION AND ORDER

Adopted: November 9, 1984; Released: December 7, 1984

BY THE COMMISSION: COMMISSIONER PATRICK CONCURRING IN THE RESULT.

1. The Commission has before it: (a) a Petition for Extradordinary Relief, filed April 19, 1984, by which Shurberg Broadcasting of Hartford, Inc. (Shurberg) requests that we designate its application (File No. BPCT-831202KF) for a comparative renewal hearing together with the license renewal application of Faith Center, Inc. to determine which applicant should operate a commercial television station on Channel 18 in Hartford, Connecticut; (b) an Opposition to (a) filed May 30, 1984 by The Department of Communications of the Capitol Region Conference of Churches, the

Management Team of the Christian Conference of Connecticut and Sherman G. Tarr (henceforth "Citizens"), through their attorneys the Media Access Project; (c) a Reply to (b) filed June 4, 1984, by Shurberg; (d) a Petition for Special Relief filed June 28, 1984, by Faith Center, Inc. (Faith) in which Faith requests authority to assign the license of Station WHCT-TV, Channel 18, Hartford, Connecticut to Astroline Communications Company Limited Partnership (Astroline) pursuant to the Commission's distress sale policy announced in our *Statement of Policy on Minority Ownership of Broadcasting Facilities*;[1] (e) Comments in Opposition to (a) and Comments in Support of (d) filed July 23, 1984, by Astroline; (f) Comments on (a) and (d) filed July 23, 1984, by the Chief, Mass Media Bureau; (g) Comments and Statement in Support of Petition for Special Relief filed July 23, 1984, by Citizens; (h) Petition for Special Relief filed July 23, 1984, by Media Access Project (MAP); (i) Comments on (d) filed July 23, 1984 by Interstate Media Corporation (IMC);[2] (j) Consolidated Comments filed July 23, 1984 by Shurberg; (k) Response to (a) filed July 23, 1984, by Faith; (l) Reply Comments filed August 2, 1984, by Shurberg; (m) Comments in Response to (i) filed August 2, 1984, by Astroline; (n) Motion for Acceptance of Late-Filed Reply Comments[3] and Comments in Response to (j) filed August 3, 1984, by Astroline: (o) Motion to Accept Late-Filed Reply Comments[4] and Reply Comments filed August 3, 1984, by Citizens; (p) Reply Comments filed August 16, 1984, by IMC;[5] (q) Motion to Strike (i) filed September 6, 1984, by Faith; (r) Opposition to (q) filed September 28, 1984 by IMC; (s) a Supplement to (h) filed October 15, 1984, by MAP; (t) a Supplemental Motion for Expedited Processing filed October 24, 1984, by Astroline; and (u) a Second Supplement to (h) filed October 29, 1984, by MAP.

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[1] 68 F.C.C. 2d 979 (1978), as revised, 92 F.C.C. 2d 849 (1982). On June 28, 1984, Faith and Astroline also filed an assignment application for Station WHCT-TV (File No. BALCT-840629KS) and a Petition for Expedited Processing of Faith's Petition for Special Relief and the related assignment application for authority to assign WHCT-TV from Faith to Astroline.

[2] We have accepted IMC's Comments in the interest of allowing all concerned parties to express their views about these matters. Nevertheless, we have refrained from considering IMC's allegations of misconduct concerning negotiations for the sale of station WHCT-TV, which have also been filed in a civil lawsuit, since such allegations are private matters not within our jurisdiction. *See In Re Application of North Dakota Broadcasting Company, Inc.* and *Central Minnesota Television Company.* 69 F.C.C. 2d 1756, 1760 (1978). In this light, Faith's Motion to Strike IMC's Comments will be granted to the extent that IMC's allegations of misconduct on Faith's part are concerned and will otherwise be denied.

[3] For good cause shown, this motion will be granted.

[4] For good cause shown, this motion will be granted.

[5] These Reply Comments will be dismissed as an unauthorized pleading. The pleading repeats allegations contained in IMC's Comments and attempts to reply to Astroline's Reply Comments. We have not solicited any Replies to Reply Comments.

2. Shurberg's Petition for Extraordinary Relief seeks a remedy which is inconsistent with the remedy sought by Faith in its Petition for Special Relief. Thus, if the Commission grants Shurberg's petition and consolidates Shurberg's application with that of Faith in a comparative hearing, we could not grant Faith's current request for permission to sell Station WHCT-TV pursuant to our distress sale policy.[6] Therefore, we are considering both of these petitions at the same time, within the context of Faith's renewal proceeding in BC Docket No. 80-730. By Order, FCC 84I-69, released July 3, 1984, our General Counsel afforded all relevant parties the opportunity of filing comments on these two pleadings, as well as replies to those comments, in this renewal proceeding. As we shall explain below, we have decided to conditionally grant Faith's third request for authority to sell its Hartford, Connecticut, television station pursuant to our distress sale policy.

3. Faith is the licensee of Station WHCT-TV, which operates on television channel 18, Hartford, Connecticut. In November 1980, the renewal application of Station WHCT-TV was designated for hearing to determine whether Faith was qualified to remain a Commission licensee. Faith indicated its intention to take advantage of our distress sale policy;[7] and subsequently, Faith came forward with a prospective purchaser of Station WHCT-TV. We granted its renewal application and its request to sell the station pursuant to our distress sale policy, subject to the conditions that the Broadcast Bureau (now the Mass Media Bureau) would find the purchaser fully qualified to be a Commission licensee and that the assignment of WHCT-TV's license would be consummated within 90 days of the Bureau's favorable determination.[8] If those conditions were not met, Faith's renewal application was to return to hearing status. In fact, the purchaser was unable to consummate the transaction and Faith's application was returned to hearing status.

4. After its first distress sale failed, Faith filed a second request to sell its station under our distress sale policy to Interstate Media Corporation (IMC). In our Memorandum Opinion and Order, FCC 83-448, released September 30, 1983, we granted Faith's second Petition for Special Relief by which it sought to sell Station WHCT-TV to IMC and granted its renewal application, subject to the conditions that the Mass Media Bureau would find IMC fully qualified to be a Commission licensee and that the assignment of the station's license would be consummated within 90 days of the Bureau's grant of the assignment application becoming final. If those conditions were not met, Faith's renewal application would automatically return to hearing status. The second

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[6] *See Clarification of Distress Sale Policy*, 44 Rad. Reg. (P&F) 2d 479, 480 n. 3. (1978).

[7] *See Faith Center, Inc.*, 83 F.C.C. 2d 401 (1980), *recon. denied*, 86 F.C.C. 2d 891 (1981).

[8] 88 F.C.C. 2d 788, 794-95 (1981).

distress sale was not consummated, and the Administrative Law Judge presiding in Faith's renewal proceeding announced that Faith's application had returned to hearing status pursuant to the Commission's September 1983 Memorandum Opinion and Order.[9] Faith's current Petition for Special Relief filed June 28, 1984, requests authority to assign the license of Station WHCT-TV to Astroline Communications Company Limited Partnership (Astroline) pursuant to our distress sale policy.

5. In its Petition for Extraordinary Relief filed April 19, 1984, Shurberg seeks to have its application (File No. BPCT-831202KF) for authority to operate on Channel 18, in Hartford, Connecticut, designated for hearing with the license renewal application of Faith Center, Inc. Shurberg observes that broadcast licenses for stations in Connecticut were scheduled to expire on April 1, 1984. *See* Section 73.1020(a)(16) of our Rules. Applications for renewal were required to be filed on or before December 1, 1983, and applications mutually exclusive with those renewal applications were due by March 1, 1984. *See* Sections 73.3539 and 73.3516(e) of our Rules. Shurberg's competing application was filed on December 1, 1983. According to Shurberg, the Commission's September 1983 Memorandum Opinion and Order granted Faith's renewal application, thereby opening a "window" for the filing of competing applications. In this regard, Shurberg asserts that we could only grant Faith's license through April 1, 1984, in our September 1983 Order because the then current license term for Connecticut broadcast stations ended on April 1, 1984.

6. Shurberg's argument is based on several erroneous assumptions. First, Faith's renewal application has not been granted. Our September 1983 Order explicitly stated that Faith's renewal application was granted subject to two conditions and that if either condition was not met, Faith's application would revert to hearing status. Since one of those conditions was that Faith and IMC consummate the assignment of Station WHCT-TV's license within 90 days of the grant of the relevant assignment application becoming final, and since that condition was never met, Faith's renewal application automatically reverted to hearing status. Second, the "window" for filing competing applications against the renewal applications of Connecticut broadcast stations, which opened for most Connecticut stations during the period from December 1, 1983, through March 1, 1984, never opened for Station WHCT-TV. There was no requirement that Faith file a renewal application for the period of 1984 through 1989, since Faith's 1977 renewal application was and remains in hearing status and competing applications cannot be filed until the proceeding has been terminated.

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[9] *See* the ALJ's Order, FCC 84M-1834, released April 16, 1984.

7. Section 307(c) of the Communications Act of 1934, as amended,[10] provides that licenses of broadcast stations whose renewal applications are in hearing status shall remain in effect pending final disposition of the hearing case. Moreover, competing applications are ordinarily not permitted to be filed against license renewal applications designated for hearing. *See, e.g., RKO General, Inc.*, 89 F.C.C. 2d 297, 315-26 (1982), *affirmed sub nom. Atlantic Television Corporation* v. *F.C.C.*, No. 82-1263 (D.C. Cir. Oct. 21, 1982). Thus, Faith's renewal application for station WHCT-TV has been placed in protected status from competing applications until the completion of its renewal proceeding, and Faith would not have to file a new or supplemental renewal application during the course of this proceeding. While a licensee whose renewal application is in deferred status must file a supplemental renewal application on the date a regular renewal application would otherwise be due, and while the filing of such a supplemental renewal application would open a three month "window" during which competing applications may be filed, *see Carlisle Broadcasting Associates*, 59 F.C.C. 2d 885 (1976), it is clear that Shurberg had no such right as of December 1, 1983, to file a competing application against the renewal application for Station WHCT-TV pending in this proceeding.

8. Shurberg asserts that the factual situation in this proceeding is very similar to the situation faced by the U.S. Court of Appeals for the District of Columbia Circuit in *New South Media Corp.* v. *FCC, (New South)*, 685 F. 2d 708 (1982). *New South* involved a situation where the Commission had, in 1977, granted several of RKO General, Inc.'s renewal applications, although it conditioned those grants on the outcome of the Boston, Massachusetts, comparative television renewal proceeding. In late 1980, following its decision denying RKO's Boston license, the Commission decided to hold non-comparative hearings to determine what action, if any, should be taken against RKO's remaining thirteen stations. Rather than wait for the license of each station to expire in the normal course and call at that time for renewal applications which would be subject to competing applications, the Commission chose to "reopen," *i.e.*, designate for hearing, the 1977 grants which had been expressly conditioned on the outcome of the Boston proceeding.

9. Thus, in the *New South* situation, the Commission chose to proceed without waiting for challenges by competing applicants, primarily because the "public interest need for clear resolution of RKO's qualifications outweighs the benefits of possibly having a choice of applicants." *RKO General, Inc.*, 82 F.C.C. 2d 291, 310 (1980). On appeal, the Court

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[10] Section 307 (c) of the Communications Act of 1934, as amended, was designated as such by Public Law 97-259, approved September 13, 1982, 96 Stat. 1087, 1093. The former Section 307(c) was deleted and the former Section 307(d) became Section 307(c).

reversed the Commission. *New South Media Corp.* v. *FCC, supra.* Although the Commission had designated all thirteen 1977-79 RKO license renewals for hearing shortly before three of the licenses in question were due to expire, it had set no specific time for the actual commencement of the hearing; rather, it had stated that the hearings would begin after all court appeals in the Boston proceeding had been completed. In 1982, when the Court issued its *New South* decision, all but one of the thirteen license renewals had run past three years, no renewal hearing had actually commenced, and there was "no evidence-taking underway, no proceeding in mid-stream or even launched."[11] Thus, the Court determined that the situation in *New South* whereby conditional renewals were, in effect, extended, was similar to the renewal deferred for three years in *Carlisle Broadcasting Associates, supra*, and that competing applicants should be allowed to file against RKO's license renewal applications.

10. Clearly, *New South* does not directly dictate the result that we should reach in this case. In *New South* the court distinguished between the situation in which an application remains in hearing status, protected from competing applications, because some relevant action, such as an evidentiary hearing, is actually under way and the situation in which an application that, while designated for hearing, is in effect simply being deferred because no action is being taken or is reasonably foreseeable. 685 F.2d at 715-16. In this case action was not simply deferred on Faith Center's renewal application. The application was designated for hearing to permit Faith Center to invoke our distress sale policy.[12] Faith Center did, in fact, twice propose assignments of its license to minority-controlled buyers. If it had been able to consummate either of those transactions, it would have been promptly replaced by a new licensee that would have furthered the minority ownership goal of increased diversity of broadcast station ownership. Unfortunately, as discussed above, Faith Center has been unable to consummate either of these two previous distress sale assignments that we have authorized.[13] Faith Center has now sought a third distress sale authorization more than three years after we first

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[11] 685 F. 2d. 708, 716.

[12] *See Faith Center, Inc.*, 48 Rad. Reg. (P&F) 2d 741 (1978). The Commission's distress sale policy permits licensees "whose renewal applications have been designated for hearing on basic qualification issues . . . to transfer or assign their licenses at a 'distress sale' price to applicants with a significant minority ownership interest . . . ." 68 F.C.C. 2d 979, 983 (1978).

[13] Although the record is not clear on this point, it appears that each of these assignments fell through largely because of difficulties incurred by the minority-controlled assignees in obtaining adequate financing. Our studies have shown that one of the major stumbling blocks to increased minority ownership and participation in broadcasting is the difficulties that minority controlled applicants traditionally have faced in obtaining financing to acquire and operate stations. *See Strategies for Advancing Minority Ownership Opportunities in Telecommunications: The Final Report of the Advisory*

designated its application for hearing. We are, therefore, now faced with determining whether the public interest in permitting competing applications to be filed, as articulated in *New South*, outweighs the goals of our minority ownership policies in this case.

11. Although this is a close question, it is our judgment that the Commission's minority ownership policies, as reflected here in the distress sale proposal, are sufficiently important to warrant maintaining Faith Center's renewal application in hearing status, protected from competing applications, for a sufficient additional time to permit us to consider the pending application to assign the license to Astroline. A successful assignment of Station WHCT-TV's license pursuant to our distress sale policy would result in the rapid conclusion of this renewal proceeding, would swiftly end Faith Center's tenure as a licensee of this station and provide residents of the station's service area with a new licensee whose qualifications are not in doubt, would advance our important policy of increasing diversity of programming and ownership in the broadcast industry by providing for minority group ownership and control of this station, and would avoid a lengthy and expensive comparative renewal proceeding. Therefore, we have decided to give Faith Center an opportunity to effectuate the currently proposed distress sale of WHCT-TV. If this distress sale does not come to fruition promptly, however, we will move expeditiously to provide Shurberg and other interested parties an opportunity to file competing applications for WHCT-TV's channel.

12. In light of the foregoing, we shall grant Faith Center's Petition for Special Relief filed June 28, 1984, by which it proposes to assign WHCT-TV's license to Astroline, subject to the conditions that the Mass Media Bureau finds Astroline qualified to be a Commission licensee[14] and that the contemplated assignment is consummated within 60 days of the Bureau's grant of the assignment application. If either of these conditions is not met, we shall promptly require Faith Center to file a supplemental renewal application for Station WHCT-TV. Potential applicants would then be afforded a 90-day period to file applications for the station's frequency in Hartford. Thereafter, all timely-filed applications, including the application (File No. BPCT-831202KF) previously filed by Shurberg, would be designated for a comparative renewal proceeding.

13. Shurberg's arguments that our distress sale policy amounts to reverse discrimination in that only entities controlled by minority group members may purchase a station from an incumbent licensee which has

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Committee on Alternative Financing for Minority Opportunities in Telecommunications to the FCC (May 1982).

[14] We hereby direct the Mass Media Bureau to act as expeditiously as possible upon the application (File No. BALCT-840629KS) by which Faith seeks authority to assign the license of Station WHCT-TV to Astroline.

been designated for a revocation or renewal hearing are without merit. In our *Policy Statement on Minority Ownership,* we found that there was an acute underrepresentation of minorities among the owners of broadcast stations and that views of racial minorities were inadequately represented in the broadcast media. 68 F.C.C. 2d 979 at 980-82. We also observed that increasing minority ownership of broadcast stations would result in diversity of control of a limited resource, the broadcast spectrum, and would result in a more diverse selection of programming for the entire viewing and listening public. *Ibid. Report on Minority Ownership in Broadcasting,* issued May 17, 1978 by our Minority Ownership Task Force.

14. In addition to our own conclusions regarding minority ownership, the District of Columbia Circuit, which has exclusive jurisdiction to review FCC licensing decisions, has repeatedly defined as an important public interest objective the participation of heavily underrepresented minorities in the ownership and operation of broadcast stations. *See, e.g., West Michigan Broadcasting Co.* v. *FCC,* 735 F.2d 601, 609-611 (D.C. Cir. 1984); *Garrett* v. *FCC,* 513 F.2d 1056, 1063 n.52 (D.C. Cir. 1975); *TV 9, Inc.* v. *FCC,* 495 F.2d 929, 937 (D.C. Cir. 1973); *cert. denied,* 419 U.S. 986 (1974); *Citizens Communications Center* v. *FCC,* 447 F.2d 1201, 1213 n.36 (D.C. Cir. 1971). Moreover, Congress has recently reaffirmed the importance of fostering minority ownership of broadcast stations. In amending Section 309(i) of the Communications Act, 47 U.S.C. 309(i), to facilitate the development of a random selection system (*i.e.,* a lottery) as an alternative to the comparative evaluation process, *See* Pub. L. No. 97-259, 96 Stat. 1087, 1094-95, Congress explicitly required that significant preferences for minority applicants be incorporated into any random selection licensing scheme. In *West Michigan Broadcasting Co.,* the court stated that the passage of that legislation must be viewed as Congressional approval for the Commission's minority ownership promotion policies and confirmation of the factual bases of those policies' remedial nature. *See* 735 F.2d at 615-16. In this regard, the Conference Report contained a specific Congressional finding that "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the economy as well." H.R. Conf. Rep. 97-765, 97th Cong., 2d Sess. 43 (1982), *reprinted in* 1982 U.S. Code, Cong. & Adm. News 2237, 2287. *See also West Michigan Broadcasting,* 735 F.2d at 603 n.5. Further, the Conference Report cited our 1978 minority ownership policy statement and the *Report on Minority Ownership in Broadcasting,* as evidence of the need for the type of preferential treatment of minorities contained in the legislation. 1982 U.S. Code Cong. & Admin. News 2237, 2288. Thus

Congress, which has the broadest remedial power of any governmental entity,[15] has recognized the need for and approved the implementation of the minority ownership policies set forth in the 1978 policy statement. We therefore must reject Shurberg's arguments against our distress sale policy.

15. After having reviewed Faith's Petition for Special Relief filed June 28, 1984, pleadings filed in relation thereto, and all the pertinent data in this docket, we have determined that the proposed sale of Station WHCT-TV from Faith to Astroline Communications Company Limited Partnership (Astroline) complies in principle with our distress sale policy. *See Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C. 2d 979 (1978), as revised, 92 F.C.C. 2d 849 (1982). The relevant assignment application (File No. BALCT-840629KS) must still be reviewed by the Mass Media Bureau. In this Memorandum Opinion and Order, we deal only with the question of whether Faith's proposed distress sale of Station WHCT-TV meets the basic requirements for a distress sales; other aspects of the assignment application involving Astroline's basic qualifications will be determined by the Mass Media Bureau pursuant to its delegated authority.[16] With regard to the basic requirements for a distress sale, Shurberg contends that Astroline is not controlled by a minority group member and that Station WHCT-TV has not been properly evaluated for purposes of determining an appropriate distress sale price. As we shall explain, Shurberg's arguments are without merit.

16. Astroline is a limited partnership comprised of two general partners and one limited partner. Richard P. Ramirez, an Hispanic-American, is a general partner with a twenty-one percent ownership interest and a seventy percent voting interest in Astroline. WHCT Management, Inc., a corporation, is also a general partner with a nine percent ownership interest and a thirty percent voting interest in Astroline.[17] Astroline Company, which is an investment company separate and distinct from Astroline Communications Company Limited Partnership (Astroline), is the limited partner and holds seventy percent owner-

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[15] *Fullilove* v. *Klutznick*, 448 U.S. 448, 483 (1980).

[16] Shurberg has made several allegations to the effect that Faith has failed to comply with relevant Commission rules and policies since the time its renewal application for Station WHCT-TV was designated for hearing. Even if the allegations are assumed to be true, they would not prevent us from approving the distress sale herein and do not require any action by us at this time, since the renewal applicant's qualifications are not a relevant consideration in a distress sale situation. If the distress sale proposed herein is not effectuated and a comparative renewal proceeding ensues, Shurberg is free to raise any of these allegations in that proceeding.

[17] Astroline has also expressed its intention to transfer 4% of Astroline's ownership (4/9ths of WHCT Management, Inc.'s 9% interest) to minority group members in order to increase the total minority group interest in Astroline to twenty-five percent.

ship in Astroline. Astroline explains that its two general partners have complete authority over its affairs and vote in accordance with their respective partnership interests. Although Astroline Company will provide Astroline with $500,000 by means of a capital contribution, a loan or a combination of the two, Astroline Company and Astroline have stated that Mr. Ramirez' ownership interest in Astroline and his voting control over Astroline will not be diminished by Astroline Company's capital contribution. Further, Astroline and Astroline Company assert that they will structure all transactions to maintain Mr. Ramirez' voting control over the affairs of the company and to insure that minority group persons have at least a 21 percent ownership interest in Astroline.

17. We hold that Astroline's ownership structure complies with our distress sale policy, as revised in *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C. 2d 849 (1982). Our most recent distress sale policy statement explicitly approves distress sales to limited partnerships when the controlling general partner or partners have a 20 percent ownership interest in the partnership and are members of minority groups. *See* 92 F.C.C 2d at 853-55. Although Astroline has two general partners, one of which is not comprised of minority group members, the facts that operating control (70 percent voting interest) is held by a minority group member, *i.e.*, Mr. Ramirez, and that Mr. Ramirez also holds a 21 percent ownership interest in Astroline establish that the limited partnership arrangement proposed here meets our criteria for a distress sale purchase.

18. Shurberg argues that the appraisals of WHCT-TV submitted with respect to Faith's two previously-attempted distress sales are no longer accurate because we have granted three construction permits for UHF television stations in New Haven (Channel 59), Hartford (Channel 61) and New London (Channel 26), all of which are located in Connecticut and might provide significant competition to Station WHCT-TV. Shurberg has not provided any specific data to support its generalized assertion. Further, of the three permittees which Shurberg mentions, only the permittee of Channel 61 has gone on the air and it began broadcasting in September 1984. Therefore, it does not appear that appraisers could accurately measure the impact of the competition WHCT-TV will receive from these three permittees.

19. In this regard, revised appraisals for Station WHCT-TV were provided in 1983 so that the impact of new competition from Station WTXX(TV), Waterbury, Connecticut, in the previous year could be considered in evaluating the value of Station WHCT-TV. *See* our General Counsel's Order, FCC 83I-26, released March 23, 1983. Of the three appraisers who evaluated Station WHCT-TV in 1981, two stated in 1983 that the station's fair market price had increased, while the third stated

that the station was worth at least as much as it was in 1981.[18] Allowing for some limited overall inflation during the last year in light of the independent assessments presented in 1983, there is no reason to assume that the station's current value has decreased. In any event, the appropriate date for assessing the value of a station for distress sale purposes is the date on which the proceeding was designated for hearing, unless the station's value has decreased since that date. Since Faith decreased the value of its station by changing its studio site in April 1981 and by removing equipment, we relied on the appraisals of the station, as updated in September 1981, when we conditionally approved Faith's proposed distress sales in 1981 and 1983.[19] We believe that those appraisals are still valid for distress sale purposes.[20] The three appraisals, as updated in September 1981, average out to $6,500,000. Thus the proposed sale price, $3,100,000, is well below the ceiling we have set for distress sale prices, namely 75 percent of the average fair market value.[21]

20. ACCORDINGLY, IT IS ORDERED, That:

(a) the Petition for Extraordinary Relief filed April 19, 1984, by Shurberg Broadcasting of Hartford, Inc. IS GRANTED to the extent indicated in this Memorandum Opinion and Order and IS DENIED in all other respects;

(b) the Petition for Special Relief filed June 28, 1984, by Faith Center, Inc., IS GRANTED subject to the conditions set forth in paragraph 12, *supra;*

(c) the Mass Media Bureau SHALL ACT AS EXPEDITIOUSLY AS POSSIBLE on the application (File No. BALCT-840629KS) by which Faith Center, Inc. seeks authority to assign the license of Station WHCT-TV to Astroline Communications Company Limited Partnership;

(d) the Petition for Expedited Processing filed June 28, 1984, by Faith Center, Inc. and Astroline Communications Company Limited Partnership and the Supplemental Motion for Expedited Processing filed October 24, 1984, by Astroline Communications Company Limited Partnership ARE GRANTED to the extent indicated in this Memorandum Opinion and Order and ARE DISMISSED as moot in all other respects;

(e) the Motion for Acceptance of Late-Filed Reply Comments filled August 3, 1984, by Astroline Communications Company Limited Partnership and the Motion to Accept Late-Filed Reply Comments filed August 3, 1984, by The Department of

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[18] *Faith Center, Inc.*, FCC 83-448, released September 30, 1983, at paragraph 10.

[19] *Id.*

[20] Shurberg has tried to resurrect an earlier claim that Faith's station lacks certain equipment and is generally overvaluated. As we explained in our 1983 Order which conditionally granted Faith's second proposed distress sale, two of the three appraisers of WHCT-TV specifically considered the cost of such equipment in their 1981 appraisals. See paragraph 8 of our Order in *Faith Center, Inc.*, FCC 83-448, released September 30, 1983.

[21] The settlement agreement entered into between Astroline and Citizens in connection with the assignment of Station WHCT-TV's license and filed with us on July 27, 1984, and the Petition for Special Relief filed by Media Access Project (MAP) on July 23, 1984, by which MAP seeks our approval of the reimbursement provisions of that settlement agreement, will be considered in a subsequent order.

Communications of the Capital Region Conference of Churches, the Management Team of the Christian Conference of Connecticut and Sherman G. Tarr ARE GRANTED:

(f) the Reply Comments filed August 16, 1984, by Interestate Media Corporation ARE DISMISSED as an unauthorized pleading; and

(g) the Motion to Strike filed September 6, 1984, by Faith Center, Inc. IS GRANTED to the extent indicated in footnote 2 herein and IS DENIED in all other respects.

21. IT IS FURTHER ORDERED That, if Faith Center, Inc. and Astroline Communications Company Limited Partnership fail to effectuate the assignment of Station WHCT-TV's license in accordance with the conditions set forth in paragraph 12, *supra*:

(a) Faith Center, Inc.'s renewal application (File No. BRCT-348) IS RETURNED to the processing line;

(b) Faith Center, Inc. IS REQUIRED to file a supplemental renewal application for Station WHCT-TV for the license period of April 1, 1984 through April 1, 1989 within 30 days after the relevant condition set forth in paragraph 12, *supra*, is not satisfied; and

(c) applications which are mutually exclusive with Faith Center, Inc.'s renewal application for Station WHCT-TV, as supplemented, MAY BE FILED during a 90-day period following the filing of the supplemental renewal application for Station WHCT-TV and WILL BE DESIGNATED FOR HEARING with the renewal application for Station WHCT-TV and the mutually exclusive application of Shurberg Broadcasting of Hartford, Inc. (File No. BPCT-831202KF).

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Application, Defective
Frequency Offset Rules
Offset Requirements
Television, Low Power

Application for review denied. Low power television interference rules provide that an applicant must explicitly specify one of the three possible frequency offsets in order for its application to be considered as proposing frequency offset operation. A low power television application which is predicted to cause interference to an existing full service television station is defective and unacceptable for filing. —*Garnerlynn Communications*

FCC 84-614

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Application of

Garnerlynn Communications

For a New Low Power Television Station on
Channel 5
Cape May, New Jersey

File No.
BPTVL-820319SU

MEMORANDUM OPINION AND ORDER

Adopted: December 6, 1984; Released: December 7, 1984

BY THE COMMISSION:

1. The Commission has under consideration a pleading styled "Application for Review," filed May 18, 1984, by Garnerlynn Communications ("Garnerlynn"), of an action by the Mass Media Bureau staff dismissing an earlier Application for Review as untimely filed. The circumstances surrounding these pleadings are fully discussed below.

2. Garnerlynn submitted its low power television application on March 19, 1982. The application was returned by the Mass Media Bureau staff on August 19, 1983, because Garnerlynn's proposed facility was predicted to cause interference to co-channel full service television station WNEW-TV, Channel 5, New York, New York. Garnerlynn petitioned for reconsidera-

tion on September 14, 1983, and claimed that the Bureau staff's engineering studies which predicted the interference failed to take into account the frequency offset proposed in the engineering section of its application. The petition was denied on February 15, 1984, by the Bureau on the grounds that while the engineering section of Garnerlynn's application proposed offset operation generally, it did not propose a specific offset as required by Section 74.705(d)(1) of the Commission's Rules.[1] The Bureau noted that although the application form used by Garnerlynn in March 1982 did not provide space for frequency offset designation, the Commission directed all applicants whose applications proposed offset operation in a *Public Notice* released June 23, 1982, to amend their applications to indicate the specific frequency offset desired within the ninety day amendment period established for all low power television applicants. *Low Power Television Service (Amendment Period)*, 51 RR 2d 1275 (1982) ("*Amendment Period*"). Since Garnerlynn failed to amend its application to specify a desired offset, its application was processed as proposing non-offset operation, predicted to cause interference to WNEW-TV and returned on February 15, 1984, as unacceptable for filing.[2]

3. In its Application for Review, Garnerlynn again contends that its application was incorrectly processed as proposing non-offset operation. However, we agree with the Bureau that the merits of Garnerlynn's pleadings provide no basis for the reinstatement of its application. The application as originally submitted generally proposed the use of offset only in its engineering exhibit, and did not specify which type of offset was intended. As noted earlier, we provided a ninety day amendment period for all low power television and television translator applicants to bring their applications into conformance with the final rules for the service and to eliminate conflict with existing broadcast stations. In the *Public Notice* establishing the amendment period, we stated, "Since the application form (FCC Form 346) does not elicit frequency offset information, *any applicant proposing offset* must so indicate by specifying "zero," "plus," or "minus" offset in the amendment." *Amendment*

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[1] Section 74.705(d)(1) of the Commission's Rules states in part "An application requesting offset carrier frequency operation must include the following: (i) A requested offset designation (zero, plus or minus) identifying the proposed direction of the 10 kHz offset from the standard carrier frequency of the requested channel."

[2] Garnerlynn filed an Application for Review on April 5, 1984, fifty days after the denial of reconsideration. The staff dismissed this pleading as untimely, and further determined that Garnerlynn's application was correctly processed as proposing non-offset operation. In the instant Application for Review, Garnerlynn contends that the dismissal of its earlier pleading by the staff was improper. While this dismissal was in accordance with the Commission's Rules, the issue of timeliness need not be addressed since we are considering the merits of Garnerlynn's pleadings.

Period, 51 RR 2d at 1276 (emphasis supplied). This requirement was also illustrated in the accompanying application amendment guide. All applicants were thus notified that this specific offset information was necessary to process their applications taking into account the extra frequency protection provided by offset. Since Garnerlynn did not specify a particular offset in its application or by amendment, its application was properly processed as proposing non-offset operation, predicted to cause interference to a full service television station and returned as unacceptable for filing.

4. Moreover, we are not persuaded by Garnerlynn's argument that the Bureau should have presumed that Garnerlynn intended to operate its proposed facility using zero offset since co-channel full service television station WNEW-TV, Channel 5, New York, New York, operates with plus offset and full service co-channel television station WTTG-TV, Channel 5, Washington, D.C., operates with minus offset according to the Television Table of Assignments. We reiterate that an applicant is responsible for maintaining the accuracy and completeness of information furnished in its application. All applications are processed and evaluated solely on the basis of the information and specifications made by the applicant therein. The Commission cannot and should not be required to speculate on an applicant's intent with regard to the specifications made in its application. Such speculation would delay the processing of all low power television and television translator applications by necessitating the restudy of every application that generally referred to offset operation between two and four times just to determine which offset, if any, would allow interference-free operation of the proposed station.[3] Garnerlynn and all other applicants were given notice that if they wished to operate their proposed stations with frequency offset, their applications must be amended to specify which offset they desired to use. *Amendment Period, supra.* Despite this requirement, Garnerlynn never specified a particular frequency offset in its application. As a result, the Bureau evaluated Garnerlynn's application on the basis of the engineering data in the application, which did not specify offset operation using one of the three possible offsets, and properly returned it because its proposed facility was predicted to interfere with the signal of a full service television station.[4]

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[3] The four options that are available in the technical processing of an application are zero, minus, plus or no offset.

[4] Garnerlynn also states that its application for Channel 13 in Vero Beach, Florida (file no. BPTVL-820319SK) was reinstated on reconsideration on an identical argument to that which it advances here. However, the Vero Beach application was inadvertently reinstated and has since been dismissed.

5. Based on the foregoing, we believe the Bureau fully considered and properly decided the matter. Consequently, Garnerlynn's pleading will be denied.

6. Accordingly, IT IS ORDERED, That pursuant to Section 1.115 of the Commission's Rules, the Application for Review filed by Garnerlynn Communications IS DENIED.

7. IT IS FURTHER ORDERED, That the Mass Media Bureau send a copy of this *Memorandum Opinion and Order* by Certified Mail — Return Receipt Requested to the applicant named herein.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Comparative Criteria
Frequency Equitable Distribution of Under 307(b)

Decisive Section 307(b) preference is not awarded where all applicants for high-powered Class C FM station would serve the entire Albuquerque urbanized area as a whole. Under contingent comparative issue, applicant proposing 100% full-time integration and having no diversification demerit preferred.

—*Hispanic Owners, Inc.*
BC Docket No. 82-570

FCC 84R-97

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
Hispanic Owners, Inc. Albuquerque, New Mexico	BC Docket No. 82-570 File No. BPH-810423AD
Professional Communications, Inc. Albuquerque, New Mexico	BC Docket No. 82-572 File No. BPH-810819AO
Loretta Rose Salazar Albuquerque, New Mexico	BC Docket No. 82-573 File No. BPH-810819AW
Spanish Radio, Inc. Albuquerque, New Mexico	BC Docket No. 82-577 File No. BPH-810819BW
Rio Rancho Broadcasting, Inc. Rio Rancho, New Mexico	BC Docket No. 82-579 File No. BPH-810819BZ

Construction Permit for
New FM Station

Appearances

A. Wray Fitch, III, on behalf of Hispanic Owners, Inc.; *Thomas J. Keller*, on behalf of Professional Communications, Inc.; *Lawrence J. Bernard, Jr.*, on behalf of Loretta Rose Salazar; *James A. Koerner*, on behalf of Spanish Radio, Inc.; *Peter Gutmann and Vincent A. Pepper*, on behalf of Rio Rancho Broadcasting, Inc.;

DECISION

Adopted: December 27, 1984; Released: January 7, 1985.

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL.

BOARD CHAIRMAN MARINO:

1. All five applicants in this comparative case propose a new high-powered Class C FM station which would serve over one-half million persons in the Albuquerque, New Mexico urbanized area (419,700 population 1980 Census). Four applicants specified the dominant central city of Albuquerque as their station location, but one of the applicants hoping to obtain a community preference proposed the nearby community of Rio Rancho. In his Initial Decision, FCC 84D-39, released June 1, 1984, Administrative Law Judge Tierney concluded that the community of Rio Rancho was entitled to a decisive community preference, 47 U.S.C. §307(b), so that it was not necessary to compare all five applicants to find out which would better serve the public under the standards set out in the FCC's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). The major question presented is whether the line of cases from *Huntington Broadcasting Co.*, 14 FCC 563 (1950), *affirmed*, 192 F.2d 33 (D.C. Cir. 1951) to *Cleveland Television Corp.*, 91 FCC 2d 1129 (Rev. Bd. 1982), is applicable here so that a decisive community preference should not be awarded. After reviewing the applicable precedent the Review Board has concluded that the *Huntington* line, *supra*, controls our decision and we must therefore decide this case "upon the comparative ability of the applicants to serve the [Albuquerque area] as a whole." *Armin H. Wittenberg*, 30 FCC 417, 418-419 (1961). See paras. 19 and 30 below.

2. *Section 307(b) Issue: Background.* All five applicants propose very similar radio facilities using maximum power and height to serve approximately 45% of New Mexico's population and all of the Albuquer-

que urbanized area. During the 1980 Census, Albuquerque had a population of 331,767 and Rio Rancho, which at that time was not an incorporated community, had a population of 9,985. Rio Rancho's boundaries abut those of Albuquerque although to the north its boundaries, according to its mayor, lie some 15 miles away. The general characteristics of the two communities are set out in the Initial Decision, *supra*, paras. 26-28 and 29-33. See also Salazar's Br. 1, and 7-8, and note 2 below.

3. While Rio Rancho's population appears to have significantly increased since 1980, I.D., para. 33, Albuquerque has also grown at a fast pace of nearly 36% between the 1970 and 1980 Census. The city's population increased by almost 90,000 and the urban area by more than 120,000. Salazar Br. 7-8. Significantly, the owner of an existing AM radio station in Albuquerque has been granted a construction permit to establish a *low power* Class A FM station in Rio Rancho. I.D., para 32. In essence, the ALJ concluded that Rio Rancho's "identified needs and separate character as a community and its growth rate all indicate that Rio Rancho would warrant an additional station, and that Rio Rancho has a superior need for [a] second local service than does Albuquerque for [a] thirtieth broadcast service." I.D. Para. 61.

4. *Contentions*: The four Albuquerque applicants challenge the ALJ's 307(b) analysis, I.D. Paras. 56-61, in awarding Rio Rancho a community preference. Major reliance is placed on the Commission's policy articulated in *Huntington Broadcasting Co., supra*, which they maintain has been applied to high power AM, TV, and FM stations. Salazar Br. 5. In the late 1940s Huntington Park was an incorporated community with a population of 31,317 some two miles from the central city of Los Angeles. Huntington Park had its own city government, churches, fraternal, social, and civic organizations, 14 FCC at 565-66. Nevertheless the Commission held that

> ... the absence of a local transmission facility in a contiguous neighboring community does not constitute a showing of substantial need for radio service where ... the frequency involved is other than a local frequency and the proposed station located either at Los Angeles or at Huntington Park would render almost identical coverage of the principal city and of the neighboring contiguous community.
> ... In this connection, the Commission has frequently held that stations located in a particular city are licensed to serve not only the needs of the population of that city but also the needs of persons residing within the station's entire service area. (14 FCC at 584, citation omitted):

5. In 1957, the Huntington principle was extended to communities in different states where an applicant for a television station in East St. Louis, Illinois sought a community preference over St. Louis, Missouri. *St. Louis Telecasters, Inc.*, 22 FCC 2d 625, 713 (1957). And in 1961 *Huntington* was applied in an FM case where an applicant for the city of

Pasadena sought a preference over Los Angeles, California. *Armin J. Wittenberg, supra.* Salazar Br. 9.

6. *Huntington* was affirmed by the D.C. Circuit in *Huntington Broadcasting Co.* v. *FCC, supra,* 192 F.2d 33. Although another aspect of the FCC's suburban community policy was vacated by the Court in 1965, the holding in *Huntington* was not disturbed by the Court which agreed that "... in cases involving an applicant for a central city and a suburban applicant which requests a power so strong that it would serve the entire urbanized area, no determinative Section 307(b) issue exists, and both applicants are to be treated at proposing service to the central city." *Miners Broadcasting Service, Inc.* v. *FCC,* 349 F.2d 199, 201, 5 RR 2d 2086, 2088 (D.C. Cir. 1965). Similarly, in *Pasadena Broadcasting Co.* v. *FCC,* 555 F.2d 1046, 40 RR 2d 1003: (D.C. Cir. 1977), the Court reversed a decision in which the FCC had refused to award a 307(b) preference to a *low power* station located some 20 miles from the central city of Los Angeles; however, *Huntington* had not been applied by the FCC to that applicant, and the Court did not question the validity of the Huntington principle. Salazar Br. 10-12.

7. Several recent developments at the FCC, according to the Albuquerque applicants, indicate that there is vitality left in the *Huntington* principle. In 1982, the Review Board applied that principle in a television case involving Shaker Heights and the central city of Cleveland, Ohio. *Cleveland Television Corp.,* 91 FCC 2d 1129 (1982), *rev. denied* FCC 83-235, May 19, 1983, *affirmed* 732 F.2d 962, 55 RR 2d 1411 (D.C. Cir. 1984). In *Beaufort County Broadcasting Co.,* 94 FCC 2d 572 (Rev. Bd. 1983), the Board refused to apply *Huntington* to Class C FM applicants because the case did *not* involve "applicants for suburban communities located near dominant central cities" such as Massillon and Cincinnati Shaker Heights and Cleveland. 94 FCC 2d at 576. In April of 1983, the FCC instituted a rulemaking proceeding which proposed refinements in the *Huntington* policy but never indicated that the principle has been overruled or abandoned. *Commission's Policy Statement Pursuant to Section 307(b) of the Communications Act of Granting Comparative Preferences Within Metropolitan Areas,* FCC 83-160, 48 Fed. Reg 19428. On the contrary, recently, in a brief filed in the D.C. Circuit the FCC acknowledged the continuing vitality of *Huntington,* but indicated that the principle did not apply to Portage (pop. 33,590) which was not a suburb of Kalamazoo (pop. 85,555). See Brief of FCC in *WHW Enterprises, Inc.* v. *FCC,* D.C. Cir. Nos. 83-2067 et al, Appeal of 89 FCC 2d 799 (Rev. Bd. 1982), *rev. denied,* FCC 83-386, September 15, 1983. Salazar Br. 15-17.

8. Based on the authorities discussed above, and others, the four Albuquerque applicants urged that because of the similarity of the facts in this case to those in *Huntington* the ALJ should not have awarded a

community preference and instead should have compared all five applicants on the traditional comparative issue.

9. On the Section 307(b) issue, the Rio Rancho applicant replies that the arguments of the competing applicants for Albuquerque are "all founded upon the mistaken assumption that the policies developed in television and regional AM cases apply equally to the FM service, which is the sole focus of the instant review." Reply Br. 2. In the *Cleveland Television* case, *supra*, the Board carefully distinguished the applicability of Section 307(b) to television and radio cases. See 91 FCC 2d at 1136. Similarly, the AM radio cases where *Huntington* has been applied the high power and the regional nature of the stations, Clear Channel, or regional Class II, and III, "have loomed large." Reply Br. 2-3.

10. Significantly, according to Rio Rancho, the concept of channel classes no longer applies to FM radio stations, because of the Commission's *FM Channel Policies and Procedures,* 90 FCC 2d 88, 97 (1982), *recon. denied,* FCC 84-282, released June 29, 1984. There the Commission indicated that in future rulemaking proceedings to assign FM radio channels to communities the choice of channel would no longer be based on the size of the "smaller community if appropriate." It points to one case where a *second* Class C channel was assigned to a community of 5,933. (Br. 4-5). Moreover "any vestige of concern with the alleged *intention* of Rio Rancho" to provide service to Albuquerque "was laid to rest" by the Commission in another rulemaking proceeding when it repealed the *Suburban Community Policy, Berwick Doctrine and DeFacto Realocation Policy,* 93 FCC 2d 436 (1983). Reply Br. 5.

11. Rio Rancho also maintains that even if the Huntington policies underlying the AM and TV cases are applicable to the FM radio service this case is not controlled by *Huntington.* It points to "the distinct needs and problems which serve to distinguish Rio Rancho from Albuquerque", to evidence which establishes that Rio Rancho is no longer a part of the Albuquerque Standard Metropolitan Statistical Area, (See Note 2 below), and Rio Rancho's explosive growth. Reply Br. 5-6. Finally, it argues that in the *Wittenberg* FM case, *supra,* relied upon by its opponents, "the Commission did not apply the *policy* of *Huntington* as such, but rather the factual findings therein, as the Section 307(b) proponent would have located in a suburb of Los Angeles, just as the Huntington Park applicant had proposed Huntington Park in *Huntington.*" Reply Br. 6-7.

12. *Section 307(b) Analysis:* First, we clear away some arguments which obscure the real issue. Both sides rely on many Commission actions in rulemaking proceedings. For example, the Albuquerque applicants argue that the rulemaking assigning the Class C channel in this case to Albuquerque questioned whether the suburban community of Alameda, with a 1970 population of more than 10,000, "was the type of city to which

we normally assign high power Class C stations." *Alameda and Albuquerque, N.M.*, 48 RR 2d 1327, 1328 (BB 1981). It would therefore be procedurally unfair for the agency to permit Rio Rancho, a comparable community, to obtain a Section 307(b) preference. They contrast the Albuquerque rulemaking action with that in *WHW*, *supra*, where the Commission "explicitly rejected the contention that [the preferred community] should be treated like a small suburban community to which a smaller facility is usually assigned." Salazar Br. 15. Rio Rancho counters with other rulemaking actions which it claims have revised the Commission's policies which govern the future assignment of FM channels to different communities, para. 10 above. It also points out that the specific rulemaking assigning the channel in this case to Albuquerque also noted that anyone wishing to apply for the channel in a different community such as Alameda could do so, providing it complied with Section 73.203(b), the Commission's then existing "fifteen mile rule." Reply Br. 7. See also *Beaufort County Broadcasting Co*, *supra*, at 573, para. 2.

13. The Commission has now changed its channel assignment procedures, as we have previously noted, and "in the future" the Section 307(b) community preference issue "for applications for communities not listed in the Commission's table of FM assignments, such as that of [Rio Rancho] will be resolved in a rulemaking proceeding to change the table of assignment." *Beaufort County*, *supra*, 94 FCC 2d at 574 n.1. Here that was not done; instead, in accordance with the practice at the time, the Commission designated a Section 307(b) issue, and a contingent comparative issue. See I.D., para. 2, Issues 2 and 4. This comparative adjudicatory case must be resolved in accordance with controlling past precedent. See *Horne Industries, Inc.*, 91 FCC 2d 1193, para. 10 (Rev. Bd. 1982), remanded on other grounds 53 RR 2d 1647 (1983).

14. Rio Rancho correctly states that this case is no longer controlled by the subjective intention of the applicant. See *Beaufort County*, *supra*, 94 FCC 2d at 574, para. 4. It also correctly notes that in the *Cleveland Television* case the Board carefully confined its decision to television cases where applicability of the *Huntington* principle had been reaffirmed by the D.C. Circuit in two television cases. *Stone* v. *FCC*, 466 F.2d 316, 321 n.4 (D.C. Cir. 1972), and *Fidelity Broadcasting Co.* v. *FCC*, 515 F.2d 684, 694-5, (D.C. Cir. 1975). See also *Buena Vista Telecasters*, 94 FCC 2d 625, 627 (1983), and *Washington's Christian Television Outreach, Inc.*, 56 RR 2d 1539 (Rev. Bd. 1984).[1] Rio Rancho also acknowledges, as it must, that the same principle has been applied to both high

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[1] In *Cleveland* and other TV cases, *supra*, the Board did distinguish television from radio. There we did not focus upon exceptional *Huntington* situations involving AM or FM radio, but the more traditional *Beaufort County* and *WHW* cases. *But cf. Ruarch Associates*, 56 RR 2d 1593 (Rev. Bd. 1984), and *Santee Cooper Broadcasting Co.*, FCC

power AM and television stations, Reply Br. 3. Thus, the narrow question before us is whether the *Huntington* principle applies to an FM station which "requests a power so strong that it would serve the entire urbanized area, [so that] no determinative Section 307(b) issue exists, and both applicants are to be treated as proposing service to the central city." See para. 6 above quoting *Miners Broadcasting* v. *FCC, supra.*

15. Since 1981, the Review Board has resolved several cases which have a bearing on the specific issue before us. *Casey Broadcasting Co.*, 89 FCC 2d 618 (Rev. Bd. 1982), *rev. denied* FCC 83-51, Feb 24, 1983, held that novel and unprecedented 307(b) preferences would not be awarded absent a strong public interest showing and decided the case on the standard comparative issue. As previously noted in the *Cleveland Television, supra,* we followed well established precedent and did not award a community preference deciding the case on the standard comparative issue. In *WHW Enterprises, supra,* we followed the more traditional Commission practice of making a community choice if the record reveals "sufficient differences between the proposals to permit a meaningful 307(b) choice." 89 FCC 2d at 812. *Huntington* is an exception to this general practice, as the Court pointed out in *Miners, supra*, 349 F.2d. 200. But *WHW*, was an FM radio case, which unlike *Cleveland Television,* did not give rise to a Huntington situation since Kalamazoo with a population of some 85,000 was not dominant in relation to Portage which with some 33,000 was some ³/₈ the size of Kalamazoo and, not a mere small suburban community. A 307(b) choice was also made in another FM radio case, *Beaufort County, supra,* which factually did not give rise to the *Huntington* exception because the two communities in question were located on a peninsula some 50 miles southwest of the central city of Charleston. This "isolation" we found distinguished the case from the high power AM radio case involving the central city of Cincinnati and the suburb of Massillon, and the Cleveland-Shaker Heights TV case. See 94 FCC 2d at 573 and 576. In none of these cases was the Board required to rule squarely on the question of whether the *Huntington* exception applies to a high power Class C FM station which serves both the central city and suburban community.

16. Salazar points to the Commission's 1961 decision in *Wittenberg, supra* for a "yes" answer to this question, but Rio Rancho struggles to distinguish that case as a "factual" rather than a "policy" decision. Frankly, this distinction escapes us, and *Wittenberg* appears to be a compelling precedent. That case involved "Pasadena a city legally separate and independent of the city of Los Angeles." Pasadena had a 1950 population of 104,557, while the population of Los Angeles was

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84R-87, released December 7, 1984 (traditional 307(b) FM radio cases where no significant differences were found and the cases were decided on the standard comparative issue).

1,970,358. But because Pasadena was a suburb of Los Angeles, and both the Los Angeles and Pasadena applicants for a non local FM channel would provide service to some 4 million persons in the Los Angeles area, the Commission held: "that the *Huntington Park* case, must govern disposition of the Section 307(b) question." Although it recognized that an AM radio station had been involved in *Huntington,* "a non local channel was also in contest there" and therefore "the Commission ruled that the decision should not rest upon Section 307(b) criteria – such as the need of a suburb for a station within its city limits – but upon the comparative ability of the applicants to serve the Los Angeles metropolitan district as a whole." 30 FCC at 418-419. See also *Miners, supra,* 349 F.2d at 201 n.3, where the Court noted that *Wittenberg* was in *accord* with *Huntington.*

17. Pasadena, in 1960 was a well-established city with its own nationally recognized institutions, and a population of more than 100,000. It was as much in need of its own local station as is Rio Rancho with a population of less than 10,000 in the 1980 census, and an *estimated* 18,000 in 1983. Rio Rancho abuts Albuquerque and had to fall within the 15 mile orbit of Albuquerque, measured from main post office to main post office, to be eligible to apply for the FM channel assigned to Albuquerque. See former Section 73.203(b). During the 1960s FM was in its infancy when the Commission decided the *Pasadena* FM case, and followed the *Huntington* principle. Today, more than two decades later, FM has emerged as an important radio service because of its technical superiority which permits it to better cover the larger markets especially at night. *See Broadcast Communications, Inc.,* 93 FCC 2d 1162 at 1163-64, 1169-70 (Rev. Bd. 1983), *rev. denied,* 55 RR 2d 997 (1984), *appeal pending,* which illustrates the technical ability of an Evanston, Illinois FM station to cover the entire Chicago area, and provide all-Spanish language programming to some 370,000 Hispanics in the Chicago area.

18. Rio Rancho and the other four Albuquerque applicants all serve more than half a million persons, some 45% of New Mexico's population, and all of the Albuquerque urbanized area. They are covered by the *Huntington* line of cases. In those AM, FM, and TV cases (*St. Louis Telecasters, Wittenberg, Stone, Fidelity,* and *Cleveland Television, supra,*) the following decisive and essential key facts were present: a non local or high power frequency or channel providing "almost identical" or "substantial coverage" of the principal city, suburban community or entire urbanized area. See O'Meara, *An Introduction to Law and How to Study it,* 48 Notre Dame Lawyer at 8-9 (1973 Supp.), relying upon Cardozo, *The Nature of the Judicial Process* (1921) at 29-30 regarding "the constant need . . . to separate the accidental and non-essential from the essential and inherent." Our identification of the essential facts is confirmed by *Massillon Broadcasting Co.,* 36 FCC 2d 809, 812, 2 RR 409,

415 (1964), where the Commission stated that when *"substantial coverage is provided to the central city,* the regional nature of the proposed service is deemed to override the applicant's proposal to serve primarily the needs of the suburb, and a proposal for such suburb should be considered with a proposal for such *central city,"* emphasis added. See also *Seven Locks Broadcasting Co.*, 37 FCC 82 at 85 (1964), which was argued the same day as !fd1Massillon, supra, where the FCC applied the same rule to "substantial coverage of the District of Columbia and the Washington urbanized area."

19. Here we hold that this solid line of *Huntington* cases is controlling because all of the applicants are for the FM channel assigned to Albuquerque, and any community within its 15 mile orbit, and all of the applicants propose power and height which will cover Albuquerque, Rio Rancho, and the entire urbanized area. Our conclusion is reinforced by *Miners'* teaching that the *Huntington* exception furthers the public interest when used to widen the inquiry by broadening the choice to the comparative ability of all the applicants to serve the needs of the entire area. 349 F.2d at 200-201. Our decision not to award a decisive community preference is also in harmony with the agency's assignment action which twice indicated that this high power Class C FM channel would be assigned to Albuquerque and not contiguous communities comparable to Rio Rancho. See *Alameda and Albuquerque, N.M., supra,* 48 RR 2d at 1327-1328. Accordingly, this case will be decided on the comparative ability of all five applicants to serve the entire Albuquerque area as a whole, *Wittenberg, supra,* and we turn to that issue.

20. *Comparative Issue: Diversification of Control.* Of the five applicants, Professional is the only one having attributable media interests. D. Garry Munson, a 35% stockholder, controls an AM-FM combination in Opportunity, Washington, an FM station in Orem, Utah, and an FM station in Harrisonville, Missouri. In addition, Dominica A. DiMaria, a 5% owner, has small interests in these stations, and John C. Larsh, another 35% owner, has a small interest in the Harrisonville station. I.D., para. 38. Because of the distances involved (between 440 and 1,000 miles), the ALJ awarded the other applicants only a "moderate" preference. I.D., para. 69. Professional argues that the preference should be reduced to a "minimal to non-existent" one. Br. at 29. We disagree with Professional that the diversification preference of the other applicants should be virtually eliminated. The Commission has recently reiterated its long-standing policy that "although not as significant as media holdings in the proposed community of license, or interests in the remainder of the proposed service area, media holdings generally in the United States must still be considered under the diversification factor." *CJL Broadcasting, Inc.*, 95 FCC 2d 544, 549 n.26 (1983). Because Professional has interests in four

other broadcast stations whereas the other applicants have no media holdings, they must be awarded a measurable preference. Moreover, even were we to lessen the preference somewhat to "slight" because none of the stations are close to the Albuquerque area, Professional's third place finish under the integration factor (*see infra*, para. 30) together with its diversification disadvantage would still require affirmance of the ALJ's conclusion that Professional is well back in the comparative pack. Its exception is denied.

21. Participation of Ownership and Management. The ALJ awarded 100% full-time integration credit both to Spanish Radio and Salazar, 70% to Rio Rancho, 55% to Professional, and 5% to Hispanic Owners. In choosing between the two front-runners, the ALJ considered Spanish Radio to be slightly better enhanced by its qualitative attributes. I.D., paras. 71, 76. We turn to the exceptions pertinent to each of the five applicants.

22. *Salazar.* Loretta Rose Salazar, a Hispanic female, is the sole owner of the applicant. She proposes to move from Santa Cruz, California to Albuquerque and to work full time as general manager of the station. In this connection, she intends to sell the antique business she currently operates in Santa Cruz. I.D., para. 47. Professional challenges Salazar's plans to sell her business as too vague and lacking a commitment to relocate to Albuquerque if she is unable to sell her business. Br. at 38-9. We disagree with this contention. Salazar's uncontradicted testimony is that if her application is granted, she will sell her business and move to Albuquerque. Salazar Exh. 1, pp. 1-2, Tr. 216-17. The fact that she had no identified prospect at the time of her testimony does not undermine her specific commitment. In the absence of contrary evidence, her testimony is entitled to credence. *See Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583, 586 (Rev. Bd.), *recon. denied*, FCC 82R-77, released December 22, 1982, *rev. denied*, FCC 83-415, released September 21, 1983. Salazar will be credited with 100% full-time integration.

23. *Spanish Radio.* Spanish Radio is a corporation claiming to have two classes of stock, common voting and nonvoting preferred. The common stock is owned equally by Rosita Martinez Campbell, Felix A. Sanchez, and Robert C. Sanchez, all of whom are Hispanic and live in Albuquerque or the proposed service area. Spanish Radio proposes that each of them work full-time at the station, Campbell as program director, Robert Sanchez as sales manager, and Felix Sanchez as public relations director. I.D., paras. 48-51. Both Professional and Salazar except to the award of more than 60% integration credit to Spanish Radio, which percentage corresponds to the total amount of stock owned in equal shares by the three named principals when the Spanish Radio application was filed. The application listed seven holders of common stock. On March

9, 1982 (the "B" cut-off date), exceptors state, Spanish Radio amended its application to indicate that the four individuals who together held the other 40% of the applicant's stock were now preferred stockholders and that the three above-named individuals would be integrated full time. Exceptors allege, however, that Spanish Radio's Articles of Incorporation which permit the issuance of only one class of "common voting stock" have never been amended even though New Mexico law requires that a corporation's Articles of Incorporation specify the classes of stock and the rights and limitations pertinent to each class. Not only has Spanish Radio failed to amend its corporate Articles to permit the issuance of preferred stock, exceptors argue, but it also has failed to comply with other statutory prerequisites for such issuance. In addition, exceptors claim that the preferred stockholders have participated regularly in corporate meetings and voted on corporate actions. Salazar Br. at 24-33; Professional Br. at 33-36. Finally, Professional alleges that both Felix and Robert Sanchez cannot meet their full-time commitments to the station because of their other business interests. Br. at 36-38.

24. The Board will not credit Spanish Radio's integration proposal. Although Spanish Radio contends that its three voting stockholders believed there were two classes of stock, common and preferred, it does not dispute the fact that at the time of the hearing it had not amended its corporate Articles as required by state law to reflect the purported change in its corporate structure. Reply Br at 3. While it asserts that this failure was a "minor defect," *id.*, we are not persuaded that Spanish Radio has demonstrated on the record that the claimed reshaping of its proposal was actually carried out. The testimony of its principals in this regard is inconsistent and unclear. Rosita Campbell, its president, at first testified that Spanish Radio only had one class of stock, then changed her testimony to say it had two classes, but could not recall when the preferred stockholders received their stock. Nor did she recall the circumstances surrounding the March 9, 1982 amendment or any discussions or agreements among the principals concerning the two classes of stock. Tr. 282-284, 288-289, 293. Felix Sanchez confirmed that there were no written agreements among the stockholders concerning the issuance of stock and that the only meeting at which the stockholders discussed the corporate Articles was when the corporation was being set up. Tr. 236-8. Although Robert Sanchez believed there was a stockholder agreement regarding the issuance of stock, he did not recall actually seeing or signing such an agreement. Nor did he recall any discussion of changes in the corporate Articles or concerning stock other than the initial issuance for monetary payment. Tr. 264-6.

25. Also belying Spanish Radio's claim that two classes of stock were created is evidence that the allegedly nonintegrated principals have

participated in the affairs of the corporation. Its stockholders have held regular meetings at which the nonintegrated principals have attended and all stockholders have participated and voted or come to an agreement on the corporate matters at hand. Tr. 238-9, 254-5, 278-9, 286-7. Thus, the facts here differ significantly from *Cleveland Television Corp., supra*, 91 FCC 2d at 1132 where the evidence specifically demonstrated that the preferred stockholders were "isolated from corporate management." No steps comparable to those taken in *Cleveland* to assure separation have been demonstrated on the record here. In short, there is a serious defect in the proof submitted by Spanish Radio that its corporate reshaping has actually occurred. In these circumstances, we must reject Spanish Radio's integration plan based on the claimed reorganization because it has failed the fundamental test required of all applicants, namely that it show why it is entitled to the integration credit it claims. Even were we to award Spanish Radio 60% integration credit by ignoring the purported change on the "B" cut-off date, the applicant would still finish far behind Salazar and slightly behind Rio Rancho in the final integration tally. Furthermore, before we could accept even the 60% figure, we would need to examine more closely the proposals of Felix and Robert Sanchez, who do not intend to relinquish their significant outside business and financial activities, to determine whether their full-time station commitments are realistic.

26. *Rio Rancho.* Rio Rancho proposes to integrate fulltime Donald S. Vogel, a 50% stockholder, as operations manager, and Stephen J. Boucher, a 20% stockholder, as general manager and chief engineer. Both have broadcast experience and will relocate to Rio Rancho if their application is granted. I.D., paras. 52-3. Professional excepts to the award of credit to Mr. Boucher on the grounds that he does not explain how he will divide his time between his two positions or describe what managerial duties he will perform. Br. at 40-1. Although Mr. Boucher's description of his anticipated duties is spare, he will receive credit. He testified that as chief engineer he would oversee the construction and maintenance of the station and that as general manager he, along with Mr. Vogel, who is the applicant's president, would oversee station operations and production. Rio Rancho Exh. 5. Both positions thus appear to involve management level functions and absent evidence to the contrary, they should be credited. *Cf. Grand Broadcasting Co.*, 36 FCC 925, 930 (1964); *Phoenix Media Corp.*, 56 RR 2d 1241, 1246-7 (Rev. Bd. 1984). In light of the primarily managerial nature of the activities to be performed by Mr. Boucher, his failure to specify a strict division of time between his respective functions is irrelevant. *Cf. High Sierra Broadcasting, Inc.* 96 FCC 2d 423, 427, 428 (Rev. Bd. 1983); *Poet's Seat Broadcasting Co., Inc.*, 78 FCC 2d 1080 (Rev. Bd. 1980).

27. *Professional.* Professional plans to integrate full time four of its stockholders who own a total of 55% of its stock in the following roles: D. Garry Munson will act as administrative director and be "ultimately responsible for all aspects of the operations of the station;" Dominica A. DiMaria will serve as business manager; Mary Pena Noskin will be the public service manager in charge of minority and community relations programs; and Charles R. Garrett, II, will serve as operations manager. I.D., paras. 41-6. No exceptions have been taken to these findings and therefore they are affirmed. *See* Section 1.277(a) of the Rules, 47 C.F.R. 1.277(a).

28. *Hispanic Owners.* Hispanic Owners is a corporation with two stockholders, Mark A. Rodriguez, Jr., who owns 95% of the issued stock, and Gustavo Perez, who owns 5%. The ALJ credited Mr. Perez's proposal to serve full time as the station's general manager but refused to award Mr. Rodriguez more than part time credit for his proposed role at the station. I.D., paras. 39-40. Hispanic Owners excepts to the ALJ's failure to award it 100% full-time integration credit. It notes that in response to Question 27 on the application form, it stated that Mr. Rodriguez would be "President, Part-Time" and that Mr. Perez would be "General Manager, Full Time," and that in its hearing exhibit it stated that Mr. Rodriquez would be employed forty hours per week as "Supervisor/General Manager." The ALJ struck the latter proposal as a variance from the application. Tr. 143-147. Hispanic Owners argues that there is no variance because Mr. Rodriguez intends to serve in both roles at the station. It further claims that it should not be bound by its application representation because the Commission revised the application form, *inter alia,* to delete Question 27, and that the effective date of this action, December 2, 1981, was prior to the "B" cutoff date in this proceeding. Br. at 10-11.

29. We affirm the ALJ's finding of a variance between Hispanic Owner's application and its hearing exhibit. While the Board has often stated that Question 27 on the old FCC application form 301 did not mandate that an applicant set forth its entire integration proposal, *WHW Enterprises, Inc., supra,* 89 FCC 2d at 817, we have also clearly held that where an answer proposing integration is given by the applicant, it must be adhered to at the hearing unless amended prior to the "B" cut-off date. *Midwest Broadcasting Co.,* 70 FCC 2d 1489, 1494 (Rev. Bd. 1979); *Gainesville Media, Inc.,* 70 FCC 2d 58 (Rev. Bd. 1978), *recon. denied,* 72 FCC 2d 799, *rev. denied,* 72 FCC 2d 795 (1979). Here, Hispanic Owners made no effort to amend its integration proposal prior to submitting its variant hearing proposal. We reject as fanciful and patently unsupported by any record evidence Hispanic Owners' claim (which was not made to the ALJ, *see* Tr. 141-147) that its hearing exhibit set forth only an "additional" commitment by Mr. Rodriguez. This contention is also

inconsistent with its other argument that it should not be bound by its earlier application representation regarding Mr. Rodriguez. This latter contention is also rejected because nothing in the Commission's modification of the application form remotely suggests that comparative applicants such as Hispanic Owners are no longer required to amend their applications when they wish to change proposals and representations made therein. Hispanic Owners will be credited with only 5% full time integration.

30. *Comparative Summation.* Salazar has been credited with 100% full-time integration, Rio Rancho with 70% full-time integration, Professional with 55% full-time participation, Hispanic Owners with 5% full-time participation, and Spanish Radio has received no integration credit. Thus, Salazar, on the basis of its quantitative advantages, is entitled to a moderate preference over Rio Rancho and Professional, *see WHW Enterprises, Inc., supra* (moderate preference for 100% integration vs. 66⅔%) and a substantial preference over Hispanic Owners and Spanish Radio. *See High Sierra Broadcasting, Inc., supra; Central Texas Broadcasting Co., Ltd., supra.* Because these quantitative differences are clear, we need not engage in an analysis of the related qualitative enhancement factors. *See Van Buren Community Service Broadcasters, Inc.*, 87 FCC 2d 1018, 1022 (Rev. Bd. 1981). In addition, Professional has received a diversification demerit and thus falls further behind the front runner, Salazar. On all counts, a grant of Salazar's application, which alone has been preferred on both of the primary objectives of comparative evaluation, integration and diversification, *Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d at 394 (1965), will best serve the public of the entire Albuquerque area as a whole. Para. 19 above.[2]

31. ACCORDINGLY, IT IS ORDERED, That the applications of Hispanic Owners, Inc. Professional Communications, Inc., Spanish Radio, Inc. and Rio Rancho Broadcasting, Inc. ARE DENIED, and the application of Loretta Rose Salazar, File No. BPH-810819AW IS GRANTED; and that Rio Rancho's motion to correct transcript of oral argument, filed December 12, 1984, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO, *Chairman, Review Board*

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[2] Although it is not decisional in this case, if necessary, we could take official notice of U.S. Census Bureau documents and practices (Tr. 456-58), which establish that since 1983 Sandoval County, of which "Rio Rancho Estates" is a part, is outside the Albuquerque MSA, I.D., para. 19. However, Rio Rancho remains a part of the Albuquerque urbanized area, which the U.S. Census Bureau identified as central city (Albuquerque) and "adjacent densely settled surrounding area." 1980 Census of Population.

FCC 84D-39

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Hispanic Owners, Inc. Albuquerque, New Mexico	BC Docket No. 82-570 File No. BPH-810423AD
Professional Communications, Inc. Albuquerque, New Mexico	BC Docket No. 82-572 File No. BPH-810819AO
Loretta Rose Salazar Albuquerque, New Mexico	BC Docket No. 82-573 File No. BPH-810819AW
Spanish Radio, Inc. Albuquerque, New Mexico	BC Docket No. 82-577 File No. BPH-810819BW
Rio Rancho Broadcasting, Inc. Rio Rancho, New Mexico	BC Docket No. 82-579 File No. BPH-810819BZ
Construction Permit for New FM Station	

Appearances

A. Wray Fitch and *John Damon, Esqs.* (Gammon and Grange) on behalf of Hispanic Owners, Inc.; *Lauren A. Colby, Esq.*, on behalf of John Deme; *Thomas J. Keller* and *William Crispin, Esqs.* (Verner, Liipfert, Bernhard and McPherson) on behalf of Professional Communications, Inc.; *Chester Naumowicz, Jr.*, and *Lawrence J. Bernard, Jr., Esqs.* (Ward and Mendelson, P.C.) on behalf of Loretta Rose Salazar; *J. Dominic Monahan, Esq.* (Dow, Lohnes and Albertson) on behalf of Land of Enchantment Broadcasting Inc.; *George W. Jones* and *David Levy, Esqs.*

(Sidley and Austin) on behalf of Wiskes/Abaris Communications Albuquerque Partnership; *Paul A. Barber, Esq.* (Rodey, Dickason, Sloan, Akin and Robb) on behalf of Southwest Women's Broadcasting, Inc.; *James A. Koerner, Esq.* (Baraff, Koerner, Olender and Hochberg) on behalf of Spanish Radio, Inc.; *B. Shelby Baetz* and *Howard Weiss, Esqs.* (Mullin, Rhyne, Emmons and Topel) on behalf of Sandia Radio, Inc.; *Vincent A. Pepper, Peter Gutmann* and *James J. McGillan, Esqs.* (Pepper and Corazzani) on behalf of Rio Rancho Broadcasting, Inc.; *James L. Winston* and *Walter E. Diercks, Esqs.* (Rubin, Winston and Diercks) on behalf of Albuquerque FM Broadcasters, Inc.; and *Norman Goldstein, Esq.*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JAMES F. TIERNEY

Issued: May 25, 1984; Released: June 1, 1984

Preliminary Statement

1. Originally, at the time of designation for hearing, this proceeding numbered eleven competing applicants. In the interim, several applicants have for one reason or another withdrawn or were otherwise dismissed. See, *Memorandum Opinion and Orders*, FCC 83M-1844, released June 3, 1983, and FCC 84M-2273, released May 14, 1984. The five captioned applicants remain as survivors.

2. Hispanic Owners, Inc. (Hispanic Owners); Professional Communications, Inc. (Professional); Loretta Rose Salazar (Salazar); and Spanish Radio, Inc. (Spanish Radio) seek a construction permit for a new station on Channel 277C at Albuquerque, New Mexico; Rio Rancho Broadcasting, Inc. (Rio Rancho) seeks a construction permit for that channel, but at Rio Rancho, New Mexico. The issues to be resolved concerning these five remaining applicants are[1]

> 1. To determine the areas and populations which would receive primary aural service (1 mV/m or greater) from the proposals and the availability of other primary service to such areas and populations.
>
> 2. To determine, in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.
>
> 3. To determine whether petitioners [Hispanic Owners, Inc., Professional Communications, Inc., Loretta Rose Salazar and Spanish Radio, Inc.] individually and separately as applicants, propose to provide primary (3.16 mV/m) service to Rio

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[1] Issues have been renumbered to account for issues added by *Order*, FCC 83M-1851, released June 3, 1983, and *Memorandum Opinion and Order*, FCC 83M-3476, released October 4, 1983.

Rancho, New Mexico, as well as to Albuquerque, New Mexico, their proposed community of license, and, if so, whether, in light of their proposed auxiliary studios in Rio Rancho, New Mexico, Petitioners, individually and separately as applicants, can receive Reciprocal Service Consideration with the applicants which proposed Rio Rancho as their community of license.[2]

4. To determine, in the event that it is concluded that a choice between the applicants should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

3. Prehearing conferences were held on October 20, 1982, and March 17, 1983, and the evidence was received in hearing sessions held on January 9 and 11, 1984. All remaining applicants filed extensive proposed findings and conclusions on March 15, 1984; all, with the exception of Hispanic Owners, filed Replies on March 29, 1984. "Motion for Leave to File Supplement to Proposed Findings of Fact and Conclusions of Law" was filed by Rio Rancho on April 26, 1984, to address the Decision of the Review Board in *Kaldor Communications, Inc.*, FCC 84R-26, released April 24, 1984. The Motion IS GRANTED and Supplement ACCEPTED.

4. For the reasons set forth hereinafter, this, as an Initial Decision, SHALL GRANT the application of Rio Rancho Broadcasting, Inc.

Findings of Fact

5. *Hispanic Owners.* Hispanic Owners is a for-profit New Mexico corporation, organized for the specific purpose of owning, operating and maintaining radio stations and communication licenses and facilities. Of its 50,000 authorized shares, 24,389 (95 percent) have been issued to Mark A. Rodriguez, Jr., and 1,283 (5 percent) have been issued to Gustavo Perez (Hispanic Owners Ex. 1).

6. Mr. Rodriguez, president of Hispanic owners, will serve as supervisor/general manager of the proposed station on a part-time basis.[3] (Hispanic Owners Ex. 2; Tr. 219-220). Mr. Rodriguez was born in 1958 in Cuba. He attended school in Fort Worth, Texas, and graduated from high school there in 1976. In the same year, he obtained a first class FCC Radio Operator's License. He attended the University of Texas at Arlington from which he graduated in 1982 with a Bachelor's Degree in Business Administration. Mr. Rodriguez lives in Fort Worth (Hispanic Owners Ex. 4, p. 1). He intends to move to Albuquerque should Hispanic Owners'

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[2] This issue was added with respect to Hispanic Owners, Professional and Spanish Radio by an *Order*, FCC 83M-1851, released June 3, 1983, and with respect to Salazar by a *Memorandum Opinion and Order*, FCC 83M-3476, released October 4, 1983.

[3] The proposal to integrate Mr. Rodriguez on a full-time basis as set forth in Hispanic Owners Ex. 2 was stricken as at variance with the application, as amended, through the B cut-off date (Tr. 141-146).

application be granted (Hispanic Owners Ex. 2). Mr. Rodriguez has worked as a board operator, disc jockey and salesman for several stations at Forth Worth, including Spanish Language station KESS. He has served as national sales manager, administrative assistant and advisor to the station manager, and supervisor of special projects for KESS and KLAT, Houston. In the last capacity, he supervised expansion projects in the stations' technical facilities. He now works as administrative assistant and advisor to both station managers. He also serves as a marketing and business consultant to Sierra Recording, a studio owned by his brother (Hispanic Owners Ex. 4, pp. 1-2). Rodriguez is a member of James Avenue Baptist Church. He is chairman of the Public Relations Committee, edits the newsletter and serves on the Financial Committee. He has served on the Advisory Committee for the Abe Lincoln Broadcasters Awards. He is director of Fort Worth Access, a non-profit corporation which serves as an overseer of the Fort Worth cable franchise (Hispanic Owners Ex. 4, pp. 2-3). Rodriguez is an Hispanic. He has no interest in any mass media properties (Hispanic Owners Ex. 4, p. 3).

7. Mr. Perez, secretary/treasurer and vice president of Hispanic Owners will serve as general manager of the proposed station on full-time basis (Hispanic Owners Exs. 1, 2). Mr. Perez was born in 1951 in Chihuahua, Mexico. He attended elementary, junior high and senior high schools in El Paso, Texas. He attended the University of Texas at El Paso for two years. Having previously resided in Lubbock, Fort Worth, Arlington and Dallas, Texas, and Tucson, Arizona, he now resides in Houston, but will move to Albuquerque should Hispanic Owners' application be granted (Hispanic Owners Exs. 2, 5). Mr. Perez worked as a part-time disc jockey on KELP, El Paso and KBLK, Lubbock from 1967 to 1970. He served as part-time student manager of KTEP (the University of Texas at El Paso station) from 1970-1972. He then worked full-time as KAMA as a disc jockey, newsman, copywriter and salesman; at KXEM as salesman; at KESS as program director, public affairs director, news director and salesman; at KAMA as a disc jockey and production director; at KLAT as news director and assistant general manager; and at KILT and KYND as a salesman. He is now a salesman for KLAT (Hispanic owners Ex. 5, pp. 1-2). Perez worked as the Campaign Service Manager for United Way of Metropolitan Dallas in 1979 and has served as Master of Ceremonies for events of the Mexican Chamber of Commerce and the League of United Latin American Citizens (Hispanic Owners Ex. 5, p. 2). Perez has no ownership interests in mass communications properties (Hispanic Owners Ex. 5, p. 2).

8. *Professional.* Professional is a New Mexico corporation formed for the purpose of applying for a construction permit to operate Channel 277C at Albuquerque. Its ownership is as follows:

D. Garry Munson	President, Director	35%
John C. Larsh	Secretary, Treasurer, Director	35%
Charles R. Garrett, II	Director	5%
Dominica A. DiMaria	Assistant Secretary, Director	5%
Mary Pena Noskin	Director	10%

(Professional Ex. 1, p. 1; Tr. 198.)

9. The voting stock of Alpha Radio, Inc., licensee of KGGR(AM) and KKPL(FM), Opportunity, Washington is owned 76.33 percent by Mr. Munson and 2 percent by Ms. DiMaria. The voting stock of Christenson Broadcasting Co., licensee of FM station KABE, Orem, Utah is owned 53 percent by Mr. Munson and 2 percent by Ms. DiMaria. Professional Communications, Inc. (a Missouri corporation), licensee of KIEE-FM, Harrisonville, Missouri is owned 98 percent by Mr. Munson, 1 percent by Mr. Larsh and 1 percent by Ms. DiMaria (Professional Ex. 1, pp. 1-2).

10. Munson proposes to serve as administrative director of Professional's station on a full-time basis. In this position, he will be responsible for all aspects of station operation and all other employees will report to him. Munson resides in Houston and is a self-employed investor in real estate and broadcast facilities. He will move to Albuquerque to fulfill his commitment. He serves as general manager of KIEE-FM and visits his stations in Opportunity, Washington and Orem, Utah for purposes of meeting with managerial and operational staff, reviewing financial and operational matters and consulting with management, as needed (Professional Ex. 2).

11. Mr. Garrett will serve as Professional's operations manager on a full-time basis. Mr. Garret resides in Dallas, Texas where he owns ZDR Survey Research, an opinion survey firm which provides consultation services to radio stations, program suppliers and advertisers. Garrett will move to Albuquerque upon assuming his employment at Professional's station. Garrett worked as an assistant news director for KTSA, San Antonio, Texas from 1973 to 1974; as a reporter for KTRH, Houston from 1974 to 1976; and as news director of KOB-TV, Albuquerque from 1976 to 1978, in which capacity he supervised six reporters and assumed responsibility for the station's public affairs programming. He has also served as news director of KUT-FM, Austin, WPLP, Tampa, Florida; and WWL, New Orleans, as well as community affairs director for WOAI, San Antonio, Texas. He has produced and hosted nightly community affairs programming for WFLA, Tampa. During his two and one-half years of employment at KOB-TV, Mr. Garrett resided in Albuquerque and was a member of the Albuquerque Press Club, the Mexican-American Journalist

Association and the New Mexico Supreme Court Bench/Bar Media Committee (Professional Ex. 5).

12. Ms. DiMaria will serve as business manager of Professional's facility on a full-time basis. She resides in Houston, Texas and will relocate to Albuquerque if Professional's application is granted. She presently is vice president of Whitney Management Corp., a Houston real estate management firm. In 1963, Ms. DiMaria was music librarian for AM station WKBW, Buffalo, New York (Professional Ex. 3).

13. Ms. Noskin will serve as public service manager of Professional's station on a full-time basis. She resides in Albuquerque and has done so for nearly her entire life. Ms. Noskin is of Hispanic descent. In her position at the station, Ms. Noskin will supervise a minority training program tailored to meet the needs of minority women in the area and will be responsible for community relations, public service announcements, and ascertainment of local needs and problems. Ms. Noskin worked at KOB-TV, Albuquerque from 1968 to 1975 in broadcast operations and from 1975 to 1979 as public affairs director, also serving as equal opportunity director for KOB-AM, KOB-FM and KOB-TV. From 1979 to 1981 she was corporate equal opportunity director for Hubbard Broadcasting, Inc., St. Paul, Minnesota with responsibility for eight broadcast facilities employing 900 individuals. She is currently employed at KGSW-TV, Albuquerque, serving as executive director for "Encuentro," a locally produced bilingual magazine video program and is the producer and host of "Accent," a public affairs program aired several times per week. She also conducts ascertainment interviews, meets with community organizations and produces public service announcements. Ms. Noskin has been a board member of the Girl Scouts, U.S.A., Chapparal Branch, New Mexico since 1975, is a board member and is on the Library Committee of St. John's College of Santa Fe, and is a member of the Albuquerque Symphony Women, New Mexico Opera Guild, New Mexico Historical Society, Albuquerque Boys' Club Auxiliary and the Sandia Girls' Academy Parent Organization. She previously served as a member of United Way Task Force for Albuquerque and the First Commission on the Status of Women for the State of New Mexico, and has participated in local political campaigns. Ms. Noskin was selected by American Women in Radio and Television to represent American women in broadcasting at the International Convention of Women in Communications held in Jamaica in 1980 (Professional Ex. 4).

14. *Salazar.* Ms. Salazar is a Hispanic female who owns her application as a sole proprietor. She will serve as general manager of her proposed station on a full-time basis, in which capacity she will hire and supervise all employees of the station and will be responsible for all facets of station operation, including news and public affairs programming. She

resides in Santa Cruz, California and will move her permanent place of residence to Albuquerque upon grant of her application. Ms. Salazar has no interest in any other medium of mass communications (Salazar Ex. 1). Ms. Salazar presently operates an antique store, of which she is the sole employee (Tr. 216). Prior to establishment of her store four years ago, Ms. Salazar worked in a leather shop for more than four years (Tr. 217-218). She has never worked at a radio station (Tr. 219).

15. *Spanish Radio*. Spanish Radio is a corporation with two classes of stock, held as follows:

Rosita Campbell	President & Director	33⅓% (Common)
Felix A. Sanchez	Vice President & Director	33⅓% (Common)
Robert L. Sanchez	Secretary-Treasurer & Director	33⅓% (Common)
Leroy Sanchez	Director	50% (Preferred)
Jorge M. de la Torre		16.68% (Preferred)
Luis F. de la Torre		16.66% (Preferred)
Alphonso R. de la Torre		16.66% (Preferred)

The preferred stock is non-voting and represents 40 percent of the equity of Spanish Radio (Spanish Radio Ex. 4). Leroy Sanchez and Jorge M. de la Torre regularly attended and participated in shareholder meetings, the latter as the representative of his two brothers, Luis and Alphonso (Tr. 238-239, 255, 278-279, 286-287).

16. Ms. Campbell is Hispanic (Spanish Radio Ex. 4). She has resided in Albuquerque for her entire life, except for two periods of three and eight years respectively when her husband's business took her out of state. She is proposed as the full-time program director of Spanish Radio's station, in which position she will be responsible for all aspects of programming of the station, including the selection and scheduling of programming. She will supervise announcers, and, with an experienced broadcaster to be hired as operations director, instruct them in FCC and station rules and policies. Ms. Campbell is not currently employed. She is a member of the Albuquerque Legal Secretary Association and has been a board member and historian. She has devoted volunteer time to sixteen organizations (Spanish Radio Ex. 1).

17. Mr. Robert Sanchez is Hispanic (Spanish Radio Ex. 2). He has resided in Albuquerque for more than ten years. He intends to be full time sales manager of Spanish Radio's station. In that position, he will direct

sales staff and the preparation, scheduling and broadcast of advertising, billing, and collections. He is currently vice president and an owner of Haciendo Home Centers, Inc., a chain of do-it-yourself and building material outlets to which he devotes approximately 10 hours per week, an activity which he intends to continue concurrent with his broadcast position. He is a member of the Racquet Club and Archery Club (Spanish Radio Ex. 2).

18. Mr. Felix Sanchez is Hispanic (Spanish Radio Ex. 3). He has resided in Albuquerque since 1958. He intends to serve as full time public relations director of Spanish Radio's station, in which position he will consult with community leaders and the public to determine programming, solicit persons to be interviewed, monitor community reaction to the station's broadcast programming, and assist the program director in the preparation of public affairs programs and public service announcements. Mr. Sanchez is chairman of the board, president and part owner of Haciendo Home Centers, Inc., to which he will continue to devote 10 hours per week concurrent with his position at Spanish Radio's station. He is on the board of directors of First City National Bank, National Economic Development Association, U.S. Small Business Advisory Council of New Mexico, Association of Commerce and Industry of New Mexico and Western Home Center Show (Spanish Radio Ex. 3).

19. None of Spanish Radio's stockholders has any other media interests (Spanish Radio Ex. 4).

20. *Rio Rancho Broadcasting.* Rio Rancho Broadcasting is a New Mexico corporation organized specifically for the purpose of constructing and operating a radio broadcasting station. Of the 50,000 authorized shares, 5,000 have been subscribed by the following persons:

Donald S. Vogel	President & Director	50%
Steven J. Boucher	Vice President & Director	20%
Donald G. Vogel	Treasurer & Director	14%
Reba M. Vogel	Secretary & Director	14%
Mark A. Nodine		2%

(Rio Rancho Ex. 3.)

21. Neither Rio Rancho Broadcasting nor any principal has any ownership interest or official position in any medium of mass communication (Rio Rancho Ex. 3).

22. Donald S. Vogel will work full time as operations manager of Rio Rancho Broadcasting's proposed station. In that position, he will oversee station operation and broadcast production. He resides in Concord, California and will establish a permanent residence in Rio Rancho upon grant of the application (Rio Rancho Ex. 4). In high school, Mr. Vogel

studied journalism, wrote for the school newspaper and served as program director of a carrier current station. At Diablo Valley College, Pleasant Hill, California, Mr. Vogel helped found a campus station and served as its first program director, working a daily air shift and training other students in programming, news production and general station operation. During this same period, Mr. Vogel worked as part-time announcer and newsman at two commercial radio stations. Mr. Vogel obtained his first class FCC license in December 1972 (Rio Rancho Ex. 4; Tr. 312-315). For eight years, Mr. Vogel worked full time in commercial radio, assuming a number of managerial positions including operations manager, production director and program director. Mr. Vogel also co-produced an RKO radio network broadcast and an album documenting the life of Elvis Presley (Rio Rancho Ex. 4). The album is distributed through Associated Broadcasters, Inc., which Mr. Vogel intends to dissolve upon grant of the Rio Rancho application (Tr. 316). Mr. Vogel currently assists his parents at Custom Glass and Screen, Pleasant Hill, California. He is a member of the College Career Group of Tabernacle Baptist Church, Concord, California and devotes time to a number of church-related activities (Rio Rancho Ex. 4).

23. Steven J. Boucher will work full time as general manager and chief engineer of Rio Rancho's proposed facility. He will oversee the construction and maintenance of the station, and, along with Donald S. Vogel, will oversee station operations and production. Mr. Boucher currently resides in Omaha, Nebraska and will establish a permanent residence in Rio Rancho upon grant of the application (Rio Rancho Exs. 3, 5). While in high school, Mr. Boucher obtained his first job in radio at station KBFE (now KSAA), Casa Grande, Arizona. He began college studies at Central Arizona College in Coolidge, Arizona where he studied electronics engineering, but was forced to discontinue for financial reasons. Mr. Boucher held a variety of positions at broadcast stations including announcing, news, production, music formatting, sales and copywriting. In June 1978, Mr. Boucher obtained his first class license. Since that time, he has worked at broadcast stations as chief engineer, consulting engineer and contract engineer, often holding up to three such positions concurrently. In one such position (at KOSO, Patterson, California), Mr. Boucher supervised the construction and installation of new studio and transmitter facilities, and filed the necessary FCC application for licensing (Rio Rancho Ex. 5; Tr. 351). Mr. Boucher personally prepared the technical portions of the Rio Rancho Broadcasting application (Rio Rancho Ex. 5; Tr. 350-351). He presently works as chief engineer at stations KLNG and KQKQ(FM), Council Bluffs, Iowa, where his duties include full-charge maintenance, twenty-four hour "on call" responsibility and, as needed, part-time announcing (Rio Ranch Ex. 5). Mr. Boucher is a

certified member of the Society of Broadcast Engineers. (Rio Rancho Ex. 5; Tr. 333).

24. *Other Comparative Considerations.* All applicants but Salazar have proposed auxiliary power at their respective transmitter sites and main studios (Hispanic Owners Ex. 3; Professional Ex. 1, p. 4; Spanish Radio Ex. 5; Rio Rancho Ex. 6).

Issue 1 - Areas and Populations

25. The applicants have stipulated, inasmuch as all propose essentially the same transmitter site and technical facilities, that there is no decisionally significant comparative coverage difference among their respective proposals (stipulation of counsel, filed March 15, 1983).

Issue 2 - 307(b) Issue

26. *Albuquerque.* Albuquerque is located in Bernalillo County. The county comprises the full Albuquerque Metropolitan Statistical Area. The 1980 census population of the City of Albuquerque was 331,767, representing an increase of 35.7 percent from 1970. The 1980 census population of Bernalillo County (and the Albuquerque MSA) is 419,700 (Spanish Radio Ex. 7). The population of Albuquerque is 33.8 percent of Spanish origin. (1980 Census Publication PC80-1-B33, Table 14.)

27. Albuquerque is served by a mayor-city council government (Hispanic Owners Ex. 7). There are twelve commercial banks with deposits of $1,754,388,000, and six savings and loan associations with deposits of $880,543,000 (Spanish Radio Ex. 7). The entire SMSA had retail sales of $1,157,305,000 (Hispanic Owners Ex. 7). Albuquerque is the home of Kirtland Air Force Base and over 400 manufacturing firms (Hispanic Owners Ex. 7). The primary employers are retail and wholesale (47,000 employees), service and miscellaneous (42,400) and government (41,300) (Spanish Radio Ex. 7). Albuquerque is served by Interstate Routes 40 and 25, one railway, 15 motor freight carriers, 3 intercity bus lines and 8 airlines (Spanish Radio Ex. 7). Albuquerque's public school system encompasses 1,200 square miles. Its enrollment of 85,645 attends 10 high schools, 20 middle schools, 2 junior high schools and 41 elementary schools (Hispanic Owners Ex. 7). Albuquerque has 2 four-year universities (the University of New Mexico and the University of Albuquerque), and a number of business, vocational, technical and correspondence schools. Its public library has one main facility and eight other branches (Hispanic Owners Ex. 7).

28. Albuquerque is served by two daily newspapers, the *Journal*, a morning paper with circulation of 87,707 and Sunday circulation of 130,141; and the *Tribune*, an evening paper with daily circulation of 44,688 (Spanish Radio Ex. 7). Albuquerque has 23 radio and 6 television stations licensed to it as follows:

	Call Sign	*Frequency*	*Facilities*
AM	KABQ	1350 kHz	5 kw-D, 500 w-N, DA-N
	KAMX	1520	1 kw-D
	KDAZ	730	1 kw-D, DA-D
	KDEF	1150	5 kw-D, 500 w-N, DA-N
	KKIM	1000	10 kw-D
	KLTN	1240	1 kw-D, 250 w-N, DA-1
	KOB	770	50 kw-U, DA-N
	KQEO	920	1 kw-D, 500 w-N, DA-N
	KRKE	610	5 kw-U, DA-N
	KRZY	1450	1 kw-D, 250 w-N, DA-1*
	KXKS	1190	1 kw-D
	KZIA	1580	10 kw-D
FM	KANW	89.1 mHz	7.5 kw, –19 ft. **
	KFLQ	91.5	8.3 kw, 4,160 ft.
	KFMG	107.9	22.5 kw, 4,130 ft.
	KHFM	96.3	2.5 kw, 4,110 ft.
	KKJY	100.3	22.5 kw, 4,110 ft.
	KLYT	88.3	1.8 kw, 4,000 ft.
	KOB-FM	93.3	21.5 kw, 4150 ft.
	KRST	92.3	22 kw, 4,110 ft.
	KUNM	90.1	8.7 kw, 4,070 ft.
	KWXL	94.1	22.5 kw, 4,130 ft.
	KZZX	99.5	23 kw, 4,134 ft.
TV	KGGM-TV	Channel 13	89.1 kw vis., 4,180 ft.
	KGSW	Channel 14	1412.5 kw vis., 4,188 ft.
	KNAT	Channel 23	933 kw vis. 4,130 ft.
	KNME-TV	Channel 5	27 kw vis., 4,150 ft.
	KOAT-TV	Channel 7	73.5 kw vis., 4,240 ft.
	KOB-TV	Channel 4	27 kw vis., 4,203 ft.

*CP: 1 kw-U, 50 kw LS, DA-2

**CP: 4,149 ft.

(Rio Rancho Ex. 2.)

29. *Rio Rancho.* Rio Rancho is located in Sandoval County, New Mexico, which was removed from the Albuquerque SMSA in 1983 (Rio Rancho Ex. 1; Spanish Radio Ex. 7). It lies approximately fifteen miles north of Albuquerque. According to the 1980 census, Rio Rancho had a population of 9,985, and was the largest city in Sandoval County (Rio Rancho Ex. 1). Two independent estimates each indicates that the population has nearly doubled since the 1980 census. The first was provided by the Public Service Company of New Mexico, the utility that furnishes electricity to the Rio Rancho area, and projected a residential population growth to 18,362 by the end of 1983 and 42,861 by 1991. That estimate is based upon customer utility records and meter counts (Rio Rancho Exs. 1 and 7; Tr. 360, 366, 369). The second survey was prepared by AMREP Corp., the development company which built practically all of the facilities and homes in Rio Rancho. The AMREP projection is based

upon quarterly surveys of new residents and found a population of 15,000 in January 1983 and estimated a growth to 18,100 by the end of 1983 (Rio Rancho Exs. 1, 8, 9; Tr. 362, 364, 371). Honorable David Bruening, the Mayor of Rio Rancho, testified that he and the city council regularly rely upon both surveys in the conduct of official city business and planning (Tr. 362-363, 365). Mayor Bruening is a systems analyst and believes that the surveys provide an adequate sampling of new residents, which, when added to base census figures, shows a growth in excess of 3,000 people per year (Tr. 373-374). The City of Rio Rancho began as a retirement community (with a 1980 census median age of 35.1), while surveys of new residents reveal that half are under 30 and 78 percent are 40 or younger. The 1980 census identified 8.9 percent of the Rio Rancho population to be of Spanish origin, 2.5 percent black and 1.0 percent American Indian (Rio Rancho Ex. 1).

30. The legislative branch of the Rio Rancho government consists of the City Council, which is invested with the right to pass and amend laws, oversee the city's finances, and protect the health, safety, welfare, morals and convenience of Rio Rancho's residents. The administration of ordinances within the city is the responsibility of the Mayor (and his staff), who delegates responsibility for compliance to various Departments. The finances of the City of Rio Rancho are controlled through the office of the City Clerk/Treasurer. The Finance Department handles all purchasing, investing of city funds and controlling of budgets, undertakes bookkeeping for other city departments and provides the government with monthly, quarterly and end-of-year reports for financial guidance. Yearly audits of city records are conducted by both private auditors and the State Department of Finance. Zoning matters within the City of Rio Rancho are handled through a nine-man zoning commission, which is responsible for regulating and issuing permits, checking building plans, handling complaints and issuing citations. Day-to-day compliance with zoning ordinances is the responsibility of the Mayor's office. The Rio Rancho Municipal Court is presided over by a Municipal Judge and has jurisdiction over all offenses and complaints under city ordinances. The Rio Rancho Police Department began operation in October 1981 and consists of 13 officers and 1 investigator. The Parks and Recreation Department develops and maintains city recreational facilities and provides recreational programs for citizens of the city. Rio Rancho has three neighborhood parks, a community center, a recreation center, and two public swimming pools. The Rio Rancho Fire Department was organized in 1965 and presently consists of seventy men and women and eight pieces of fire-fighting equipment. The Ambulance Rescue Squad was established in 1970, and by 1980, included federally approved ambulances with telemetry equipment capable of transmitting EKG strips and talking to local

hospitals. Rio Rancho is a part of the Albuquerque public school system, but has its own library system. In 1982, the Human Rights Board was created and invested with the responsibility to preserve, protect and promote human rights and human dignity by working to prevent, rather than to react to, human rights violations within Rio Rancho (Rio Rancho Ex. 1, pp 2-5).

31. Rio Rancho contains approximately 400 separate businesses. A representative list of organizations active in Rio Rancho includes the American Association of Retired Persons, American Legion Post 118, Boy Scouts of America, the Chamber of Commerce, Cibola Little League Association, Disabled American Veterans, Fire Department Association of Volunteers, Hadassa, Jewish War Veterans, Italian American Association, Kiwanis Club, League of Women Voters, National Association of Retired Federal Employees, Rio Ramblers Square Dance Club, Rio Rancho Civic Association, Rio Rancho Democratic Club, Rio Rancho Lodge 2500 BPOE Elks, Rio Rancho Jewish Club, Rio Rancho Republican Club, Rio Rancho Senior Citizens' Center, Rio Rancho Theatre Workshop, Rotary Club, Sandoval County Civitan, Sons of Italy, Star Heights Neighborhood Association, Telephone Pioneers of America and Veterans of Foreign Wars (Rio Rancho Ex. 1, pp. 5-6)

32. Rio Rancho is served by one weekly newspaper, the *Observer.* A construction permit has been granted to John Deme to construct a Class A FM station at Rio Rancho, but the station has not been built. The station proposes effective radiated power of 3 kw from an antenna height above average terrain of 98 feet. Mr. Deme is the owner of station KZIA(AM, Albuquerque, New Mexico (Rio Rancho Ex. 1, p. 6; Ex. 2, p. 1).

33. Mayor Bruening stated that Rio Rancho has a substantial number of problems and needs which are separate and distinct from those of Albuquerque and Bernalillo County to the south. Among these are the need for ordinances to cover emerging needs, the lag of financial resources behind growth and the need to provide services required by the rapidly increasing population (Tr. 330-331).

Reciprocal Service to Rio Rancho

34. The Albuquerque applicants—Hispanic Owners, Professional, Salazar and Spanish Radio—introduced evidence under this issue describing the means by which they will serve Rio Rancho if their applications are granted. All of these applicants will provide city-grade (3.16 mV/m) or greater service to the entire city of Rio Rancho (Tr. 110-111).

35. Hispanic Owners will establish an auxiliary studio in Rio Rancho. It will ascertain the needs of Rio Rancho and address "a substantial percentage of its programming to meeting those needs" (Hispanic Owners Ex. 6, pp. 1-2). Professional will also establish an auxiliary studio centrally located in Rio Rancho. It will have the capacity to originate local

programming and will be designed to serve as a Rio Rancho base of operations for the news and public affairs personnel of the station who will produce programming pertaining to Rio Rancho. The auxiliary studio will be staffed during normal business hours to insure ready accessibility to the citizens of Rio Rancho. Duplicate public inspection files will be maintained at the Albuquerque and Rio Rancho studios. The Professional station will identify itself on the air as "Albuquerque-Rio Rancho" (Professional Ex. 1, pp. 2-3).

36. In the event Rio Rancho is determined to be the preferred community under §307(b) of the Communications Act, Salazar will construct an auxiliary studio within the corporate limits of Rio Rancho. An employee of her station will be present at the Rio Rancho studios at least 20 hours each week and will be responsible for collecting items of interest to Rio Rancho residents for inclusion in the regular newscasts of the station. The employee will also solicit local organizations for noncommercial spot announcements publicizing the activities of community organizations in Rio Rancho, ascertain the needs and problems of the Rio Rancho area, and produce for broadcast over the station a regular weekly public affairs program consisting of interviews with leaders in the Rio Rancho community and/or discussions of ascertained problems and needs (Salazar Ex. 2).

37. Spanish Radio, Inc., will establish a studio-office in Rio Rancho, capable of program origination. The office will be used as local headquarters for a sales staff and for the collection, production and airing of local news, public affairs and public service announcements. The Rio Rancho facility will be readily accessible to residents of that community and staffed on a daily basis during regular business hours. Public inspection files will be maintained there as well as in Albuquerque, and continuous ascertainment efforts will be undertaken in Rio Rancho (Spanish Radio Ex. 6).

Standard Comparative Issues

Diversification

38. Of the five applicants which remain in this proceeding, only Professional has any attributable media interests (Hispanic Owners Ex. 4, p. 3, Ex. 5, p. 2; Salazar Ex. 1, p. 1; Spanish Radio Ex. 4; Rio Rancho Ex. 3, p. 2; Professional Ex. 1, pp. 1-2). D. Garry Munson, the president, a director and the owner of 35 percent of Professional's voting stock owns: (a) 76.33 percent of the licensee of an AM/FM combination licensed to Opportunity, Washington; (b) 53 percent of the licensee of an FM station licensed to Orem, Utah; and (c) 98 percent of the licensee of an FM station licensed to Harrisonville, Missouri. In addition, Dominica A. DiMaria, an officer, director and owner of 5 percent of Professional's stock, owns 2

percent of the station in Opportunity, Washington and 2 percent of the station in Orem, Utah, and 1 percent of the station in Harrisonville, Missouri. Finally, John C. Larsh, the secretary/treasurer and owner of 35 percent of Professional's stock, owns 1 percent of the licensee of the Harrisonville, Missouri station (Professional Ex. 1, pp. 1-2). Albuquerque is approximately 700 miles from Harrisonville, Missouri; 440 miles from Orem, Utah; and 1,000 miles from Opportunity, Washington (Professional Ex. 6).

Best Practicable Service - Integration of Ownership and Management

39. *Hispanic Owners.* Hispanic Owners is a corporation which has issued a total of 25,672 shares of its stock to two stockholders. Mark A. Rodriguez, Jr., owns 24,389, or 95 percent, and Gustavo Perez owns 1,283 shares, or 5 percent of the applicant's stock (Hispanic Owners Ex. 1; Tr. 135). Mr. Rodriguez will work "part-time" at the station in the event that Hispanic Owners' application is granted (Tr. 142-147). Mr. Perez will be employed full time at the station as general manager. While neither Mr. Rodriguez nor Mr. Perez now reside in Albuquerque, they will establish residences there in the event the Hispanic Owners application is granted (Hispanic Owners Ex. 2, p. 1).

40. Mr. Perez was born in Chihuahua, Mexico in 1951. He received his early education in El Paso, Texas and attended the University of Texas at El Paso for two years. At age 21, he began a career in radio broadcasting and has lived in various Texas cities ever since. He presently resides in Houston. He has worked at a number of different radio stations since 1967, serving as an announcer, news person, copywriter, public affairs director, news director and salesperson. He is presently the "top-billing" salesperson at station KLAT, Houston, Texas. He is Hispanic, and he has been active in the Hispanic community of Houston (Hispanic Owners Ex. 5, pp. 1, 2).

41. *Professional.* Professional is a corporation which has issued 1,000 shares of stock to six individuals.[4] Professional proposes that four of its stockholders who, in combination, own 55 percent of its stock will devote their full time to the management of the station in the event its application is granted (Professional Ex. 1, p. 2).

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[4] Professional Ex. 1, p. 1 lists only five stockholders. However, as of the "B" cut-off date, the applicant had six stockholders. An amendment to the application was accepted by *Order,* FCC 84M-039, released January 6, 1984, reporting that Mary Noskin had obtained the 10 percent of the applicant's stock formerly owned by Monty Muse, provided that the applicant would not be permitted to "upgrade" its comparative position (Tr. 196-198). For purposes of the comparative issue, Professional has six stockholders and Mary Noskin owns only 10 percent of the applicant, rather than the 20 percent described in Professional Ex. 1, p. 1.

42. D. Gary Munson, who owns 35 percent of Professional's stock and is its president, proposes to be "ultimately responsible for all aspects of the operations of the station," as administrative director. All employees of the station, including the general manager, will report to him. He proposes to move to Albuquerque in the event the application is granted. Munson is a self-employed investor in real estate and broadcast facilities who lives in Houston, Texas. From Houston, he presently serves as the general manager of station KIEE-FM, Harrisonville, Missouri. He has been actively involved in the management of other broadcast stations in which he holds an ownership interest (Professional Ex. 2).

43. Dominica A. DiMaria, the owner of 5 percent of Professional's stock, proposes to be business manager. She is a resident of Houston, Texas where she is an officer of a real estate management firm. She will move to Albuquerque in the event Professional's application is granted (Professional Ex. 3).

4. Mary Pena Noskin, the owner of 10 percent of Professional's stock, proposes to serve as public service manager. She will be responsible for supervising the station's minority training program, community relations, public service announcements and ascertainment of local needs and problems. Ms. Noskin is Hispanic, and she has resided in Albuquerque for most of her life. Since 1981, she has been employed at an Albuquerque television station, where she produces a local, bilingual program, hosts a public affairs program broadcast several times a week, produces public service announcements and conducts ascertainment interviews.

45. From 1968 through 1975, Ms. Noskin was employed by KOB-TV, Albuquerque, where she worked in programming, production, community relations and employment. She also served as public affairs director and equal opportunity director for that station and its AM and FM affiliates. From 1979 to 1981, she was the corporated equal opportunity director for Hubbard Broadcasting, Inc., in St. Paul, Minnesota, where she was responsible for instituting systematic and continuous equal opportunity procedures for eight broadcast facilities with over 900 employees. She has participated in civic activities in Albuquerque, serving on the Board of the Girl Scouts of America and on the library committee of a local college. She has also maintained memberships in a number of local civic organizations and was a member of a recent United Way fund-raising drive. She was a member of the First Commission on the status of Women for the State of New Mexico from 1968 to 1970 and was one of 20 women in the United States selected by American women in radio and television to represent American women in broadcasting at the International Convention of Women in Communications held in Jamaica in 1980 (Professional Ex. 4, pp. 1-3).

46. Charles R. Garrett, II, who owns 10 percent of Professional's stock and is a resident of Dallas, Texas proposes to move to Albuquerque and serve as operations manager. He lived in Albuquerque from May of 1976 through November of 1978 while employed as the news director of KOB-TV. While at KOB, he was a member of several local journalists' groups. He worked at various radio stations as a reporter, assistant news director, community affairs director and news director between 1973 and 1976. In addition, he produced and hosted community service programs for a Florida radio station and was a news director of a radio station in New Orleans (Professional Ex. 5, pp. 1-2).

47. *Salazar.* Ms. Salazar, a Hispanic female, is an individual applicant. In the event her application is granted, she will be the sole owner of the radio station proposed in her application. She is a resident of Santa Cruz, California but upon grant of her application, she proposes to move her permanent place of residence to Albuquerque where she will supervise the construction of her station. Upon completion of construction, she will become the general manager of the station and work in that position on a full-time basis, at least 40 hours each week. She will be responsible for hiring and supervising all the employees of the station and will oversee all facets of the station's operations. Her supervisory responsibilities will include news and public service programming, some of which will be designed to serve the needs of Hispanics. Ms. Salazar has resided in Santa Cruz, California for the past 12 years and has been a resident of California her entire life. At present, she owns and operates an antique business which she established almost four years ago. Prior to that time, she was the manager of another retail business. She leases space for her business, and the lease expires in October 1984. In the event her application is granted, she will sell the business and move to Albuquerque (Salazar Ex. 1, pp. 1-2; Tr. 216-218).

48. *Spanish Radio.* Spanish Radio is a corporation with two classes of stock, common (voting) and preferred (nonvoting).[5] The common stock is owned equally by Rosita Martinez Campbell, Felix A. Sanchez, and Robert L. Sanchez. Preferred stock is owned by Leroy Sanchez, Jorge M. de la Torre, Luis F. de la Torre and Alfonso R. de la Torre (Spanish Radio Ex. 4). All stockholders are Hispanic Americans, none have any other media interests, and all live in Albuquerque or within the service area (*ID.*).

49. Rosita Martinez Campbell, Spanish Radio's president and 33⅓ percent owner of its common stock, proposes to be program director of the station. She will be responsible for the selection of the programming and determining when it will be broadcast. She will supervise the announcers and assist an experienced operations director in instructing

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[5] It was stipulated that amended Articles of Incorporation had not yet been filed as of January 9, 1984 (Tr. 393).

the announcers concerning FCC and station rules and policies. Ms. Campbell has resided in Albuquerque for most of her life and is a Hispanic female. She has been an officer of the Albuquerque Legal Secretaries' Association and a den mother for the Cub Scouts of America. Although the record indicates that she has devoted volunteer time to other organizations, it does not appear that she has been a member or an officer of any other civic organization (Spanish Radio Exs. 1, 4).

50. Robert Sanchez, the owner of 33⅓ percent of Spanish Radio's common stock, proposes to be the full time sales manager of the proposed station. He is Hispanic and has resided in Albuquerque for more than 10 years. He is a member of two local clubs (Spanish Radio Exs. 2, 4).

51. Felix Sanchez, the owner of 33⅓ percent of Spanish Radio's common stock, proposes to the full time public relations director of the proposed station. In that capacity, he will consult with community leaders and with the public. He will also solicit community leaders to appear on programs to be broadcast over the station, monitor community reaction to the station's programs, and assist the program director in the preparation of public service announcements. Felix Sanchez has been a resident of Albuquerque since 1958 and is Hispanic (Spanish Radio Ex. 3). Although Felix Sanchez listed several civic associations in his biographical exhibit, cross examination revealed that he has not been active in any Albuquerque civic activity (Tr. 243-244).

52. *Rio Rancho Broadcasting.* Rio Rancho Broadcasting is a corporation whose stock subscribers are: Donald S. Vogel, 50 percent; Stephen J. Boucher, 20 percent; Donald G. Vogel, 14 percent; Reba M. Vogel, 14 percent; and Mark A. Nodine, 2 percent (Rio Rancho Ex. 3). The applicant proposes that the owners of 70 percent of its stock will be active in the day-to-day operation of its station. Donald S. Vogel, its president, a director and the owner of 50 percent of its stock, will be the full time operations manager of the station. Mr. Vogel now resides in Pleasant Hill, California, but proposes to move to Rio Rancho if the application is granted. His broadcast experience began in college where he helped found a campus radio station. In 1972, he began an eight year full-time career in commercial radio. He has held positions as operations manager, production director and program director at various radio stations. Beginning in late 1977, he worked on a documentary on the life of Elvis Presley which culminated in a three-hour program broadcast over a radio network in August of 1980 (Rio Rancho Broadcasting Ex. 4).

53. Stephen J. Boucher, vice president, a director and the owner of 20 percent of the applicant's stock, will work full time as the general manager and chief engineer of the proposed station. Mr. Boucher's broadcast experience began in high school when he obtained a job at a radio station in Casa Grande, Arizona. Later, he studied electronics

engineering in college, but did not finish for financial reasons. He had held a variety of positions at broadcast stations where he obtained experience in announcing, news, production, music formatting, sales and copywriting. In 1978, he obtained a first class radio telephone operator permit from the Commission. Since that time, he has worked at broadcast stations as chief engineer, consulting engineer, and contract engineer. He has supervised the construction and installation of studio and transmitter facilities for a new station and filed the necessary application for licensing. He is employed as chief engineer at stations in Council Bluffs, Iowa, and is a certified member of the Society of Broadcast Engineers. He will move to Rio Rancho in the event the Rio Rancho Broadcasting application is granted (Rio Rancho Ex. 5).

Ultimate Findings and Conclusions

Areas and Populations Issue

54. There is no significant comparative difference among the proposals of the respective applicants. This fact is set forth in the March 15, 1983, stipulation of counsel; hence, it is concluded that the areas and populations issue is not of decisional significance.

Section 307(b) Issue

55. In a word, Section 307(b) of the Communications Act of 1934, as amended (47 U.S.C. 307(b)), requires the Commission "to provide a fair, efficient, and equitable distribution of radio service . . . among the several States and communities." This mandate embraces two attributes or aspects: the need of the service areas proposed by the respective applicants for a new reception service (reception aspect), and the need of the specified communities for a new transmission facility (transmission or local outlet aspect). *Kent-Ravenna Broadcasting Co.*, 22 RR 605, 610-611 (1961). Reception here has already been considered under the areas and populations issue and, as noted, needs no further consideration.

56. Local outlet or transmission aspect centers on the notion of the relative needs of the communities in question for a new local transmission service, and, most frequently, choice in this regard arises in the contest of a hitherto unserved community seeking its first local station. *Southern Media Corp.*, 11 F.C.C. 688, 689, (1946). Over the years, 307(b) has been interpreted to create a preference for a community of substantial size which sought an additional outlet, e.g., in *Newark Broadcasting Corp.*, 11 F.C.C. 1269, 1272 (1947), an applicant from Newark was preferred over one from New York, Newark having but three existing stations to New York's more populated community which had sixteen stations at the time. The Commission's consideration and treatment of *additional* outlets was specifically approved in *FCC* v. *Allentown Broadcasting Corp.*, 349 U.S. 358 (1955).

57. Of more recent vintage in *WHW Enterprises, Inc.*, 89 F.C.C. 2d 799, 811 (Rev. Bd. 1982), the basic thesis of the reception *versus* transmission aspect was stated: "The relative needs of two communities for a local transmission service are weighed primarily in light of the number of broadcast facilities already licensed to each community and the population of these communities." In *WHW*, an earlier precedent was approvingly cited, *Babcom, Inc.*, 24 F.C.C. 2d 690 (Rev. Bd. 1970), where it was observed:

> Clearly the presumptive need of a community for a second local transmission service, providing a first competitive voice in a community which now has access to only one such voice, outweighs the need of another, even though considerably larger, community for a fifth standard and ninth aural broadcast facility. (*Babcom* at 697.)

58. Under the priorities set out in *FM Channel Policies/Procedures*, 90 F.C.C 2d 88 (1982), here we are concerned with (a) the number of aural services received in the proposed area; (b) the number of local services; (c) the need for or lack of public radio service; (d) the relative size of the proposed communities; and (e) their growth rate (*Id.*, 92, fn. 8). Since the parties here propose exclusively commercial service, (c) is of no moment in this proceeding.

59. In this contest, Albuquerque is served by 29 broadcast facilities, 12 AM, 11 FM, and 6 television stations; of the AM stations, 7 operate full time. Albuquerque is also served by two daily newspapers. Rio Rancho, on the other hand, has no local station, though a construction permit is outstanding but unbuilt. Rio Rancho is served by one newspaper. Albuquerque's 1980 Census population is 331,767 while Rio Rancho's most recent population was approximately 18,000. The most recent decennial growth of Albuquerque was 35.7. Rio Rancho's population has nearly doubled since the 1980 census and is predicted to quadruple within the decade.

60. Rio Rancho would have it that its need of a first local outlet is squarely in line with *Pasadena Broadcasting Co.* v. *FCC*, 555 F. 2d 1046 (D. C. Cir. 1977) holding that Section 307(b) virtually ensures "an applicant for first local service preference over one who proposes merely to complement pre-existing local operations" (at 1050), and that the population ratio in this instance "is far greater" than those proving dispositive of the need for a second service (first competitive) station in *Babcom, supra.* Rio Rancho Broadcasting's opponents, citing particularly *Massillon Broadcasting Co., Inc.* 2 RR 2d 409, 415-416 (1964), among other arguments, state that Rio Rancho, being little more than a bedroom community of Albuquerque, in seeking a Class C channel assignment is actually planning to serve the larger audience/population of Albuquerque and that consequently Rio Rancho would not be the preferred 307(b)

community, and that disposition of this case in any event must rest on comparative grounds.

61. Not so, states Rio Rancho Broadcasting, alluding to the testimony of the Mayor of Rio Rancho who "identified unmet needs of Rio Rancho which are far different from those of Albuquerque." Also, Rio Rancho Broadcasting argues that the Commission's elimination of deintermixture considerations (which previously would have mandated consideration of the propriety of assigning a powerful channel to a smaller community), and the elimination of the Suburban Community Doctrine, which would have invited inquiry whether Rio Rancho's preferral was realistically designed to serve the needs of the greater Albuquerque area, obviate any service challenged by its opponents that Rio Rancho cannot be preferred under 307(b). On balance and weighing the disparate evidence and argument of the parties, Rio Rancho would have the better of the results of the contentions. Though depending for some supportive public services on Albuquerque, its identified needs and separate character as a community and its growth rate all indicate that Rio Rancho would warrant an additional station, and that Rio Rancho has a superior need for a first or second local service than does Albuquerque for a twelfth FM, twenty-fourth aural and thirtieth broadcast service. Under these circumstances, the application of Rio Rancho Broadcasting would best provide a fair, efficient and equitable distribution of radio service; it is clearly to be preferred under Section 307(b) and IT IS SO CONCLUDED.

Reciprocal Service

62. Four of the remaining applicants have been granted permission to invoke reciprocal service considerations. Rio Rancho Broadcasting argues that "[a]pparently fearful of the otherwise fatally dispositive nature of the 307(b) issue," they have hit upon their salvation by invoking that "doctrine," and "whatever theoretical existence the doctrine may have, it has never been a factor of decisional significance in any reported comparative broadcast proceeding." (Rio Rancho Broadcasting's Proposed Conclusions at p. 41). That doctrine was first articulated in *Kent-Ravenna Broadcasting Co., supra.* There, it was observed, in the discretion of the forum permitting consideration of the doctrine, when no proposal can be awarded a significant preference under Section 307(b), the added reciprocal service issue is to be treated as a contingent comparative issue.

63. Rio Rancho Broadcasting suggests that "[t]he modern attempt to reincarnate reciprocal service arose in *Radio Greenbrier, Inc.*, 80 F.C.C. 2d, 107, 115-117 (Rev. Bd. 1980)." Rio Rancho Broadcasting also notes *Radio Greenbrier* and *WHW, supra,* where "the Board stated that reciprocal service would be inappropriate where 'a significant distinction can be drawn between the communities' needs for additional service.' "

Finding "reciprocal service is offensive to the statutory scheme which infuses all comparative broadcast hearings in which 307(b) considerations are heard," Rio Rancho Broadcasting urges that for that very reason the concept be rejected here.

64. Summing up the separate "attempts" of its opponents to invoke reciprocal service, Rio Rancho Broadcasting states that, in any event, its opponents have totally failed to demonstrate they would provide service to Rio Rancho and having equally failed to meet this burden by admissible evidence, even providing auxiliary studios, without much more, cannot rise to a decisional significance for Section 307(b) purposes.

65. There is the additional consideration here and this is bottomed on Rio Rancho Broadcasting's Supplement to its Proposed Findings accepted earlier herein. In that submission, Rio Rancho Broadcasting points out that the Review Board in *Kaldor Communications, Inc.*, FCC 84R-26, released April 24, 1984, ". . . [took] the occasion to declare that 23 years of precedent demonstrate that the reciprocal service 'doctrine,' as a vestigial organ of the Commission's Section 307(b) policies, has atrophied from non-use, attempted misuse, and internal inconsistency into extinction (subject, of course, to revivification and rehabilitation by the Commission *en banc*)." *Id.*, para. 7). And, Rio Rancho Broadcasting further notes that the Board "in no uncertain terms" observed there:

> We conclude, again subject to further Commission guidance, that the "doctrine" was a noble experiment in Section 307(b) jurisprudence which self-destructed and that the public interest is not wellserved by continuing to invoke its quixotic name. In a very complex area of communications law it provides only the illusion of a proper basis for declining to recognize a decisive Section 307(b) preference. We shall henceforth decline to give any serious consideration to the "doctrine" in Section 307(b) determinations. (*Id.*, para. 10.)

66. On that score, Rio Rancho Broadcasting urges that "until such time as the full Commission [reverses] the *Kaldor* decision, the reciprocal service issue in this proceeding must be resolved adversely to the Albuquerque applicants 'as a matter of law' without regard to the specific showings proffered" in that regard. Having earlier found that Rio Rancho Broadcasting is the preferred applicant under Section 307(b), *Kaldor* simply fortifies that result and would, unless revivified as described by the Board, preclude any need for consideration of the comparative attributes of the proposed reciprocal service of the Albuquerque applicants.

67. To have the fullest benefit of the entire record in this proceeding, prudence would suggest that the customary contingent comparative evaluation among the applicants at bar be also resolved, if not only for reasons that disposition at this level is not usually the last word, but also that appellate bodies have the benefits (or burdens) of all possible decisional attributes of the evidence of record.

Comparative Aspects Among the Applicants

68. The rock upon which all rests in comparative considerations among broadcast applicants is, of course, *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393 (1965), and the abundant precedent flowing from it. In a word, that *Policy Statement* sets down the two primary objectives sought by the Commission in selecting the best qualified between two or more mutually exclusive applicants: (a) the maximum diffusion or diversification of control of the mass media of communications, and (b) the best practicable service to be provided to the public.

69. *Diversification* is the more significant of the factors under the standard comparative issues. *CJL Broadcasting, Inc.*, 54 RR 2d 1037 (Rev. Bd. 1983) and *Multiplex Communications, Inc.*, 54 RR 2d 733 (Rev. Bd. 1983), among others. Here, only Professional among the active applicants has principals controlling other broadcast interests, the other applicants having no such attributable interests. Since the media interests owned by Professional's principals are located at substantial distances from Albuquerque, the preference to be accorded its opponents, at most, would be moderate rather than substantial. *Town and Country Radio, Inc.*, 70 F.C.C. 2d 572 (Rev. Bd. 1978).

70. Under the other major primary objective, ***best practicable service*** to the public, the criteria for appraisal under that objective are the degree or extent of integration of ownership with management—oft-referred to as quantitative factors—and various other factors, among which are past broadcast experience, local residence, civic participation and other enhancing factors such as minorities and female participation—generally termed as qualitative factors. Prominent among the applicants here in integration of ownership/management is Salazar. Salazar has 100 percent ownership enhanced by Hispanic and female attributes. *Van Buren Community Service Broadcasters, Inc.*, 87 F.C.C. 2d 1018 (Rev. Bd. 1981); *Waters Broadcasting Corporation*, 91 F.C.C. 2d 1260 (1982).

71. Hispanic Owners proposes to integrate but 5 percent of its stockholders in full-time management positions which places it substantially behind its opponents in this respect. Rio Rancho Broadcasting proposes 70 percent full-time integration, Spanish Radio proposes 100 percent full-time integration, Salazar proposes 100 percent full-time integration, and Professional proposes 55 percent full-time integration. Spanish Radio's proposal as it now stands in the evidence, under its integration plans, would warrant 100 percent credit in spite of the degree of control over its proposed facility by nonvoting shareholders. Salazar would have it that Spanish Radio, in undertaking to create nonvoting stock for its integrated shareholders, demonstrates its intention "to falsely inform the Commission it had done so" when, in fact, Spanish

Radio did not amend its corporate charter to reclassify its stock as required by New Mexico law.

72. Spanish Radio, rejecting Salazar's argument, says that while it may not have filed amended Articles of Incorporation with the New Mexico authorities, it is a matter of "minor local infirmit[y]" and is not of decisional significance, citing *Sardis Broadcasting Co.*, 50 RR 2d 1402 (Rev. Bd. 1982) and *Anderson, Stuart and Walker*, 4 F.C.C. 463 (1937). It should also be noted that Spanish Radio would credit itself Salazar and Rio Rancho with "100 percent ownership . . .[to] be integrated . . . on a full-time *basis*." Rio Rancho appears to claim but 70 percent for itself; Rio Rancho would concede "nominally" 100 percent to Spanish Radio premised presumably upon the suggested uncertain nature of its "de jure" stock holdings. Spanish Radio, in the evidence of record, would appear to have the better of all arguments, and, as reflected in the Findings, it will be credited with 100 percent integration, as with Salazar.

73. The fashioning or designing of the most favorable criteria (so long as the representations are factually genuine) addressed to comparison under the best practicable service is, of course, permitted, if not invited, under long-standing precedent bottomed on the *Policy Statement, supra.* Indeed, it would seem a dereliction were one to do otherwise. Here, Spanish Radio, under its Exhibit 4 in evidence, has done just what is perfectly permissible, albeit that the ministerial act of amendment to its corporate charter had not taken place at the time of hearing.

74. Salazar, while credited with 100 percent integration and enhancement as a Hispanic and female, does not enjoy local residence or broadcast experience or cognizable civic activities at her present residence, albeit she proposes to move to Albuquerque should she receive the grant in contest. All of Spanish Radio's stockholders are Hispanic and long-time local residents and one-third of its voting stock is owned by a female. Rio Rancho Broadcasting's principals are not members of a minority, nor have local residence; one of Rio Rancho's principals has been active in civic affairs, but not in Albuquerque or Rio Rancho.

75. Auxiliary power is a factor of much less significance than either diversification or integration. All of the applicants except Salazar have auxiliary power proposals. While there may be differences among those proposing auxiliary power, e.g., where to be placed and what equipment, there is little difference among them to provide a basis of comparative choice or preference on this "less significant comparative factor"; thus, a slight preference for those with auxiliary power over the one with no such proposal, Salazar.

76. In summary then, comparatively, Spanish Radio and Salazar would be the front-runners here, virtually a dead heat under best practicable service with no diversification blemishes. Each would be 100

percent integrated and each would be enhanced by 100 percent minority ownership. Salazar would also have the clearly cognizable enhancement of female ownership in the hypostatic condition with female and minority as a Hispanic. Where these would part from a virtual dead heat is the comparative factors of Spanish Radio's principals, the one-third ownership by a Hispanic female, local residence and cognizable civic activities; Salazar is not a local resident and has had no discernible civic activities. Hence, Spanish Radio would rank first in what could be termed a photo-finish, with Salazar an extremely close second.

77. Rio Rancho Broadcasting will rank next, having no diversification attribute and with 70 percent integration of its principal owners in management, with little or no other qualitative or enhancement attributes. Hispanic Owners, proposing only minimal integration, albeit entirely Hispanic-owned and thus enhanced with minority credit, would be ranked next. Professional, ranking last, even with 55 percent integration credit, one a local resident and Hispanic, because of its comparative taint in diversification. However that factor, because the media interests lie at considerable geographical distance from the Albuquerque community, nevertheless, on balance, would at least affect, something more than superficially, its total proposal.

78. All of this, however, is largely hypothetical in that under Section 307(b), for the given reasons, Rio Rancho Broadcasting would be the preferred applicant and clearly the one who should prevail.

That being so and the public interest so warranting, the application of Rio Rancho Broadcasting, Inc., for the captioned facilities at Rio Rancho, New Mexico, premised on the governing conditions underlying Section 307(b) of the Communications Act of 1934, as amended, may be AND IS HEREBY GRANTED;[6] the applications of Hispanic Owners, Inc, Inc.; Professional Communications, Inc.; Loretta Rose Salazar; and Spanish Radio, Inc., must, therefore, be AND ARE DENIED.

IT IS SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION
JAMES F. TIERNEY, *Administrative Law Judge*

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[6] In the event exceptions are not filed within *30 days after the release of this Initial Decision*, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Comparative Criteria
Diversification, of Control of Mass Media
Ownership and Management, Integration of

> **Where three of four broadcast applicants propose 100% quantitative ownership integration, the comparative analysis focuses on relative qualitative enhancement credit, and Review Board affirmed ALJ's choice of applicant. No diversification demerit assessed for relationship with advertising and consulting firm or for post cut-off purchase and divestiture commitment within 30 days, and residence credit does not require full-time habitation.**
>
> *—Jerome Thomas Lamprecht*
> MM Docket No. 83-985

FCC 84R-93

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Jerome Thomas Lamprecht Middletown, Maryland	MM Docket No. 83-985 File No. BPH-820409AB
Dragon Communications, Inc. Middletown, Maryland	MM Docket No. 83-986 File No. BPH-820421AK
Barbara D. Marmet Middletown, Maryland	MMDocket No. 83-987 File No. BPH-820908AW
Port Royal Broadcasting, Inc. Middletown, Maryland	MM Docket No. 83-988 File No. BPH-820908AO
For Construction Permit for a New FM Station	

Appearances

John Wells King and *John P. Crigler,* on behalf of Jerome Thomas Lamprecht; *Robert Lewis Thompson,* on behalf of Dragon Communications, Inc.; *Harold K. McCombs, Jr.*, on behalf of Barbara D. Marmet; and *Jeffrey D. Southmayd,* on behalf of Port Royal Broadcasting, Inc.

DECISION

Adopted: December 11, 1984; Released: December 17, 1984.

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL.

BOARD MEMBER JACOBS:

1. In this comparative broadcast proceeding, because three of the four applicants propose 100% *quantitative* ownership integration on a fulltime basis, we are called upon to perform the quintessential adjudicatory task of examining and weighing their differing *qualitative* enhancement attributes to determine which proposal to meld ownership and hands-on station management is the most meritorious. *See, e.g., Radio Jonesboro, Inc.*, 96 FCC 2d 1106, 55 RR 2d 991 (Rev. Bd. 1984). We affirm the grant of Barbara D. Marmet's application.

2. By Hearing Designation Order, 48 Fed. Reg. 45598, published October 6, 1983, the mutually exclusive applications of Jerome Thomas Lamprecht (Lamprecht), Dragon Communications, Inc. (Dragon), Barbara D. Marmet (Marmet), and Port Royal Broadcasting, Inc. (Port Royal) for authority to construct a new FM broadcast station on Channel 276A at Middletown, Maryland, were designated for consolidated hearing on the standard comparative issue.[1] The Initial Decision (I.D.), FCC 84D-42, released June 14, 1984, granted Marmet's application, holding that Marmet's integration proposal, as qualitatively enhanced by local residence, civic participation, and 100% female ownership integration, and as augmented by her auxiliary power proposal, was "markedly superior" to either Lamprecht's or Port Royal's. Dragon finished last with a "healthy comparative demerit" under the comparative criterion of diversification of control of the media of mass communications and a quantitative proposal

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[1] Other issues were also designated, but they were resolved prior to hearing. In addition, presiding Administrative Law Judge Walter C. Miller added a Section 1.65 failure-to-update issue against Dragon, which he ruled moot when its proponent defaulted under its burden of proceeding. Initial Decision, n. 1. Marmet's limited exceptions challenge most of these issue dispositions and the ALJ's refusal to add further issues against its three opponents. These exceptions have no decisional significance in light of the result herein and will not be considered. Section 1.282(b)(2) of the Commission's Rules, 47 CFR 1.282(b)(2).

(76%) "so far" behind the others that its qualitative attributes could not bridge the gap. I.D., Concl. 4, 7, 15.

3. The proceeding is now before the Review Board on exceptions filed by all of the applicants. The Board has reviewed the I.D. in light of the exceptions and reply briefs, the oral argument held October 10, 1984, and our examination of the record. We adopt the findings of fact and conclusions of law in the I.D., except as modified herein. While Marmet's opponents have striven mightily to dethrone her eminence, their grappling hooks have only scratched the surface and she remains ensconced; grant of her application will best serve the public interest, convenience, and necessity.

4. We first address Dragon's exceptions in order to determine whether it, like D'Artagnan, should be included among the "Three Musketeers" on whom the ALJ's qualitative enhancement analysis focused. Dragon's diversification "demerit" was derived from two sources. First, the ALJ concluded that Thomas Buffington Associates, Inc. (Associates), a Washington, D.C. advertising agency and communications consulting firm, is a cognizable media interest attributable to Dragon because Thomas Buffington, Dragon's president, director, and 51% owner, is also president, director, and 100% owner of Associates, citing *Eastern Broadcasting Corp.*, 30 FCC 2d 745, 753 (Rev. Bd. 1971); *Mid-Florida Television Corp.*, 69 FCC 2d 607, 649 (Rev. Bd. 1978); and *Berryville Broadcasting Co.*, 70 FCC 2d 1, 15 (Rev. Bd. 1978). In its exceptions Dragon argues that these cases are distinguishable, since Associates has no consulting clients in the Frederick, Maryland market (the proposed station's service area) and has never bought advertising time on a Frederick market station, Tr. 455-56, and, thus, Buffington's interests will not undermine the Commission's diversification objectives - "maximizing available program services and viewpoints and preventing any undue concentration of economic power contrary to the public interest."[2] Dragon is correct. The cited cases all involve advertising firms which have previously placed advertising on stations in the proposed community of license or within their service area and will continue to do so. That is not Associates' situation. Advertising and consulting firms are not media of mass communications, *Pittsfield Community TV Assn.*, 94 FCC 2d 1320, 56 RR 2d 134 (Rev. Bd. 1983), *rev. denied*, FCC 84-459, released September 28, 1984 (Comm'n), and the potential for media concentration or serious conflict of interest is too remote here to warrant any demerit. *Id.*

5. However, Dragon is not unscathed. It also excepts to the ALJ's attribution of four Florida radio stations to it (because Dragon's vice-president and 25% stockholder Gary Hess has a 25% interest in them) on

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[2] *Morris, Pierce & Pierce*, 88 FCC 2d 713, 724, 50 RR 2d 959, 968 (Rev. Bd. 1981).

the ground that Hess timely undertook to divest these Florida interests if the Middletown application were granted. Here Dragon is only partially right. It is true that Dragon included a divestiture commitment by Hess as part of its February 17, 1984 hearing exhibits exchange (Dragon Exh. 2 at 2), but that commitment was untimely as to Station WVTY(FM), Holiday, Florida, and Station WFNN, Dunedin, Florida, in which Hess acquired ownership interests in May 1983—more than 30 days before his February post-B cutoff divestiture commitment.[3] *See Santee Cooper Broadcasting Co.*, FCC 84R-87, released December 7, 1984, para. 18 (there a "sufficiently contemporaneous" divestiture commitment was made within 24 days; Section 1.65 of the Rules, 47 CFR 1.65, allows 30 days for substantial and significant updates of applications, and a divestiture pledge made before an ownership interest is required to be reported is certainly "contemporaneous"). Thus, as Dragon concedes, Br. at 13, it must be assessed a very slight diversification demerit (and its opponents, a corresponding preference) for its 6.25% attributable interest in the two 1000-mile distant Holiday and Dunedin stations. *See Kist Corp.*, 57 RR 2d 49, 65-66 (Rev. Bd. 1984); *cf. Christian Broadcasting of the Midlands, Inc.*, 57 RR 2d 87 (Rev. Bd. 1984), *and Greater Wichita Telecasting, Inc.*, 57 RR 2d 926, 928 (1984) (slight demerits awarded for larger ownership interests in distant media).

6. Turning to Dragon's ownership integration proposal, the ALJ awarded it 76% full-time quantitative credit for its plan to integrate Buffington and Hess as general manager and director of the station's operations and engineering, respectively. He also noted that Buffington is Black and has been involved in broadcast or broadcast-related work since 1964, and that Hess proposes to move to the proposed station's service area if the Dragon application is granted and has been in broadcasting since 1966. I.D., Finds., para. 22, 24-26. However, the ALJ declined to award any quantitative credit for either the proposed 12% full-time integration of Christine DeWitt or the 12% part-time integration proposal of George Christopher, Jr., holding that these proposals were at variance with Dragon's October 24, 1983 integration statement, prepared in response to the ALJ's Prehearing Order, FCC 83M-3641, released October 17, 1983. I.D., Finds., para. 19. Dragon excepts to this curtailment, arguing that the ALJ should have focused on earlier (February 2, 1983) or later (December 16, 1983) "clarifying" iterations of its integration plan and that he abused his discretion in insisting that nothing but the October 24 plan counted. We affirm the ALJ's ruling. We recently commented with

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[3] Hess acquired his interests in Stations WTAI and WLLV(FM), Melbourne, Florida, in late January 1984. *See* FCC 84-1225, released March 13, 1984; official notice taken of underlying license transfer grants to Silicon East Broadcasting, Inc., in which Hess has a 25% interest.

approval on the ALJ practice of requiring submission of complete integration plans at an early prehearing date. *Metro Broadcasting, Inc.*, FCC 84R-85, released December 3, 1984, n. 9. Similarly, in the instant case we find no abuse of discretion in the promulgation of the ALJ's Order, or in his adherence to it; the fact that the October 24 plan was submitted before communications counsel was retained by Dragon provides no basis for not accepting it as Dragon's official integration proposal as of that fateful date.[4]

7. Under these circumstances, it is clear that the ALJ properly excluded Dragon from further comparative consideration, for the 24% quantitative integration gap between its proposal and that of its opponents is decisive (especially when combined with its diversification demerit) and cannot be overcome by its qualitative attributes, *See Van Buren Community Service*, 87 FCC 2d 1018, 1022, 50 RR 2d 115, 119 (Rev. Bd. 1981), *rev. dismissed*, 50 RR 2d 1433 (Comm'n 1982). This is so, despite Dragon's 51% minority ownership integration, because while minority ownership is entitled to significant weight in the comparative process, it is not a *per se* comparative determinant. *See Radio Jonesboro, Inc., supra.* Rather, it is an enhancement factor of equal weight with other such factors, *id.*, and the credit given is directly proportional to the quantitative ownership involved, *New Continental Broadcasting Co.*, 96 FCC 2d 544, 546, 55 RR 2d 413, 415 (Rev. Bd. 1983). Thus, giving due weight to all of the enhancement factors noted in paragraph 6, *supra*, Dragon's integration proposal still falls substantially short of the others in overall quantitative/qualitative credit and need not be considered further.[5]

8. Most of the exceptions of Lamprecht and Port Royal attempt to tear down Marmet's integration proposal, rather than build up their own, and we shall now examine these contentions. The ALJ gave Marmet 100% full-time quantitative integration credit as an individual applicant proposing to work a minimum of 40 hours per week as general manager. He also

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[4] Indeed, linguistic clarity is not within the sole province of the Bar and, alas, on occasion has been known to be lacking in those quarters. Nevertheless, he who proceeds without counsel does so at his own risk. *Silver Beehive Telephone Co.*, 34 FCC 2d 738, 739, 24 RR 2d 238, 240 (1972).

[5] Contrary to Dragon's exceptions, it would be a comparative loser, even if it received the full integration credit that it seeks, because its opponents would still enjoy either a "clear" quantitative integration edge, *see New Continental Broadcasting Co.*, 88 FCC 2d 830, 50 RR 2d 1117 (Rev. Bd. 1981) (12.5% full-time quantitative integration differential is decisive), *remanded on other grounds*, 93 FCC 2d 1275, 53 RR 2d 1004 (Comm'n 1983), or (at least Marmet) a slight overall integration preference, *see San Joaquin TV Improvement Corp.*, 96 FCC 2d 594, 54 RR 2d 1206 (Rev. Bd. 1983) (100% vs. 87% quantitative credit disparity given qualitative comparison; 100% integration proposal prevails), and this Decision, *infra.* Dragon's diversification demerit then becomes a St. George-like *coup de grace.*

granted her qualitative enhancement credit for service area residence since 1979, service area civic activities since 1977, and her status as a female 100% owner serving as general manager. I.D., Finds., paras. 28-34; Concls., paras. 11-12, 15. Each of these conclusions is contested with both verve and hyperbole, but close scrutiny of the record leads us to affirm these quantitative and qualitative attributes in all respects.

9. We pass over without comment Port Royal's contention that Marmet is entitled to no female enhancement credit because there is no direct evidence in the record that Mrs. Barbara Marmet is a female. *Res ipsa loquitur.* Of more serious moment are the arguments that Marmet is not entitled to 100% quantitative integration credit because: she has never worked fulltime for pay in her life (Lamprecht and Port Royal); has no previous broadcast experience and has not undertaken preparatory training for the gamut of functions that she has undertaken as general manager (Lamprecht and Port Royal); and her integration proposal lacks general credibility in light of alleged misrepresentations of facts in her hearing testimony (Dragon and Port Royal). The proposed remedy for these defects ranges anywhere from total disallowance of all integration credit (Dragon) to "marked lessening" (Port Royal, citing *Gainesville Media, Inc.*, 72 FCC 2d 795, 796-97, 45 RR 2d 1621, 1622 (1979)) to an unspecified diminution of credit (Lamprecht). We affirm the ALJ's grant of 100% credit to Marmet. It is hornbook law that lack of past broadcast experience or non-broadcast experience is not relevant to quantitative integration credit. *E.g., Cannon's Point Broadcasting Co.*, 93 FCC 2d 643, 650, 53 RR 2d 953, 959 (Rev. Bd. 1983), *rev. denied*, FCC 84-161, released April 13, 1984 (Comm'n). And the facts that Marmet was a 20-hour per week paid bookkeeper in her husband's communications law firm and in a real estate management company from 1967 to 1975 and served two years as a 40-hour per week volunteer treasurer for Planned Parenthood, as well as in other volunteer positions, I.D., Finds., paras. 31-32; Tr. 94-97, 123, 144, and relevant and ample indicia of her participation in the work ethic. As to the claim that Marmet misrepresented facts in her testimony, the ALJ declined to so conclude and made no adverse credibility findings concerning her in the I.D. Having studied the disputed testimony (concerning the proper addresses at which the Marmet's two automobiles are registered), we find nothing more than a minor mistake of fact which does not evidence an intent to deceive—hardly enough to warrant any serious attention or sanction. *See, e.g., Garrett, Andrews and Letizia, Inc.*, 86 FCC 2d 1172, 49 RR 2d 1001 (Rev. Bd.), *rev. denied*, 88 FCC 2d 620, 50 RR 2d 802 (Comm'n 1981). We are satisfied that

Marmet has set forth an earnest and permanent integration proposal,[6] which cannot be toppled with the exceptors' weak reeds of speculation, conjecture, and surmise.

10. Next, Lamprecht and Port Royal challenge the ALJ's conclusion that Marmet's principal place of residence since 1979 has been in Urbana, Maryland, within her proposed station's service area. As such, under the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396, 5 RR 2d 1901, 1910 (1965), Marmet is entitled to service area residence credit, which is less than but "closely follows" local (community) residence credit. *Id.* Lamprecht argues that the record shows either that Marmet's principal residence is actually in Bethesda, Maryland (outside the proposed service area) or that Marmet has a "dual residence" in both Bethesda and Urbana. (The inarticulated implication of a finding of dual residence is apparently that Marmet would deserve diminished—or no?—residence credit.) Similarly, Port Royal maintains that full-time residency is required for any residence credit and that, at most, Marmet is dividing her time between two distant residences. They both call attention to indicia that the Bethesda location is very much in use—bills, newspapers, visiting college students, etc. Although the ALJ acknowledged that some evidence pointed to disallowing Marmet's Urbana home as her principal residence, he concluded that the weight of the evidence supported Urbana. We agree with the resulting enhancement credit to Marmet, but our reasoning differs from the ALJ's.

11. First, we note that, contrary to Port Royal, *full-time* residence is not a prerequisite for residence credit. *Ruarch Associates, supra n. 6* (service area residence during 35% of the time given reduced enhancement credit). Second, the *Policy Statement, supra*, speaks neither of "principal" residence nor of "dual" residence—only "local residence" and "residence outside the community." The work "principal" was inserted into the proceeding by Marmet herself, Marmet Exh. 1 at 1; Tr. 85, in order to characterize the nature of her residence and distinguish it from her Bethesda residence. This effort, while laudatory for its candor, has proven analytically and legally clumsy because it misfocuses Commission attention on legal definitions of "principal," "residence," "domicile," etc., instead of on the real issue, which is the extent to which Marmet has obtained a knowledge of or displays an interest in her local community or service area. *Policy Statement, supra.* Finally, the evidence shows that

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[6] By contrast, we note that the ALJ questioned but did not disallow the integration proposals of Dragon principal Hess (25%) and Port Royal principal Nancy S. Southmayd (4%). I.D., Finds., nn. 4 and 8. We echo his concern and admonition, quoting *Tidewater Teleradio, Inc.*, 24 RR 653, 656-657 (1962), that integration proposals "must be seriously advanced and seriously regarded in actual operation." We have not shrunk from disallowing inherently implausible or suppositious integration proposals in the past, *e.g.*, *Ruarch Associates*, 56 RR 2d 1593 (Rev. Bd. 1984), and will not do so in the future.

Marmet has owned the Urbana residence since 1976, began restoring it as an historic landmark in 1977, and starting using it by the end of 1979. I.D., Finds., para. 29; Tr. 92, 98-100. Thus, while the parties argue over whether Urbana is Marmet's "principal" residence, this is beside the point; it is clearly at least a part-time residence. Marmet has further shown involvement in three service-area civic organizations concerned with historical preservation, the environment, and the Frederick County Symphony, I.D., Finds., para. 33, and testified that she has been a five-hour per week volunteer at the Frederick County Memorial Hospital and a member of the board of directors of the hospital auxiliary since January 1984. Tr. 118-19. In contrast, no other applicant has any present local or service area residence at all (Dragon's Hess proposes future service area residence and Lamprecht, future Middletown residence), and the only past or present civic participation of other applicants is the membership and monthly attendance at meetings of Port Royal's 48% owner Richard R. Leverrier in the Middletown Chapter of AMVETS since October 1982. Port Royal Exh. 3 at 2.[7] In this light, Marmet's residence enhancement credit, based on a five-year presence and proven civic interest, exceeds that of her detractors; she is the only past and present part-time service area resident with any level of civic involvement, and, in a close case like this one, that is a sufficient distinction to earn her a very slight residence enhancement preference. *See Ruarch Associates, supra n. 6; Birmingham Family, TV, Inc.*, 91 FCC 2d 348, 354, 52 RR 2d; 525, 529 (Rev. Bd. 1982).[8]

12. The preceding discussion essentially resolves the question of civic participation enhancement credit, as well. While we disagree with the ALJ's refusal to accord Port Royal any civic participation credit (see note 7, *supra*) and concur in the view that "Marmet can hardly be considered a paragon of civic participation," I.D., note 10, we nevertheless conclude that Marmet's service area civic involvement, dating back to 1977, is sufficient to warrant another very slight enhancement preference. *See Waters Broadcasting Corp.*, 91 FCC 2d 1260, 52 RR 2d 1063 (1982), *aff'd sub nom. West Michigan Broadcasting Co.* v. *FCC*, 735 F. 2d 601 (D.C.

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[7] Consistent with *Bradley, Hand, and Triplett*, 89 FCC 2d 657, 663, 51 RR 2d 383, 388 (Rev. Bd. 1982), we will grant Port Royal's exception and accord it some very slight enhancement credit for this recent civic involvement. Marmet deserves approximately the same recognition for her hospital volunteer work, which was not credited by the ALJ either.

[8] We reject Lamprecht's argument that his proposed future Middletown residence is entitled to more credit than Marmet's five-year service area residence. Actual residence of such moderate-term duration, even in the service area, is entitled to more credit than a mere promise of future residence in the community of license. *Cf. Cannon's Point Broadcasting Co., supra*, 93 FCC 2d at 650-51, 53 RR 2d at 959-60 (recent local residence given slight credit over proposed future local residence).

Cir. 1984) (civic participation credit given for service area activities). Contrary to Lamprecht's and Port Royal's exceptions, civic participation credit is not reserved only for leadership roles in organizations (although such roles are entitled to greater credit), and we reject their claim that Marmet's activities do not reflect, or confer, any knowledge of or interest in the welfare of her service area. See paragraph 11, *supra; Waters Broadcasting Corp., supra.*

13. As to previous broadcast experience, it cannot be gainsaid that both Lamprecht and Port Royal enjoy preferences over Marmet (who claims no such experience). As a 100% owner who has had broadcast and broadcast-related experience since 1974, Lamprecht's preference is greater than Port Royal's, which is derived from 48% stockholder Leverrier's experience since 1970. *See New Continental Broadcasting Co., supra,* 96 FCC 2d 544, 54 RR 2d 413 (qualitative credit is proportional to quantitative ownership). Nevertheless, even Lamprecht's preference over Marmet in this area of comparison is very slight, because amongst enhancement elements broadcast experience is deemed to be of only minor significance lest qualified newcomers be discouraged from entering the field. *Id.; Policy Statement, supra,* 1 FCC 2d at 396, 5 RR 2d at 1910.

14. Finally, we turn to Marmet's 100% female ownership participation versus Port Royal's 52% female integration proposal. As with other enhancement factors, the degree of credit is proportional to quantitative ownership, *see* paragraph 13, *supra,* and the fact that Marmet will serve in the key role of general manager, while Port Royal's integrated females are slated for the lesser roles of financial operations manager (48% owner Mary Ellen Ferrel) and sales manager (4% owner Nancy Southmayd), further enhances Marmet's qualitative superiority. *See Cannon's Point Broadcasting Co., supra* (significance of 100% female integrated general manager); *Absolutely Great Radio, Inc.,* 95 FCC 2d 1023, 1030-31 n. 26, 55 RR 2d 15, 22 n. 26 (1983) (relative weight of different policy roles emphasized).[9]

15. What remains for consideration are the efforts by Lamprecht and Port Royal to best each other, even if they cannot overcome Marmet's lead. The only noteworthy exception is Lamprecht's attempt to discredit

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[9] We previously considered, *arguendo,* in paragraphs 6 and 7 and note 5, *supra,* the comparative significance to be given Dragon's 51% integrated minority ownership. While it is well established that the enhancement credit awarded for female participation is less than that accorded minority participation, *Radio Gaithersburg, Inc.,* 72 FCC 2d 820, 829, 45 RR 2d 1709, 1715 (Rev. Bd. 1979), it is equally "well established that qualitative attributes, *such as minority ownership,* may enhance the value of an integration proposal but cannot overcome clear quantitative differences" (emphasis supplied), *Horne Industries, Inc.,* 56 RR 2d 665, 667-68 n. 12 (1984). In the instant case, the quantitative and qualitative attributes of Marmet's proposal, taken as a whole, clearly exceed Dragon's.

and decredit the 52% of Port Royal's integration proposal attributable to Mesdames Ferrel and Southmayd. Lamprecht asserts that these principals are unlikely to effectuate their integration commitments because both have small children and will commute to work rather than relocate to Middletown. While Lamprecht's paternal instincts are duly noted, they are not legally cogent. *See WRLJ, Inc.*, 56 RR 2d 287 (Rev. Bd. 1984). Both women have previous work histories, and their proposed commutes will only be approximately 35-45 minutes each way. Tr. 321, 342. On this record, we cannot say as a matter of law that either their work proposals or their commutes are inherently unreasonable. *See Radio Jonesboro, Inc., supra.* They will be fully credited.

16. Summing up the comparative analysis, we have considered all decisionally significant exceptions and conclude that Marmet's very slight preferences for service area residence and civic participation, and more substantial preference for female integration as general manager, are sufficient to overcome Lamprecht's and Port Royal's slight preferences for previous broadcast experience and to warrant grant of Marmet's application. As between Port Royal and Lamprecht, we give greater emphasis than did the ALJ to Port Royal's 52% female integration[10] and auxiliary power proposal, and accord very slight credit for Leverrier's AMVETS activity in Middletown. These three factors overcome Lamprecht's very slight advantage for previous broadcast experience and his slight credit for future Middletown residence, putting Port Royal in second place behind Marmet. Dragon remains in last place.

17. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend filed by Barbara D. Marmet on July 19, 1984 and by Port Royal Broadcasting, Inc. on September 5, 1984 ARE GRANTED and the amendments ARE ACCEPTED; and

18. IT IS FURTHER ORDERED, That the application of Barbara D. Marmet (File No. BPH-820908AW) for a construction permit for a new FM station at Middletown, Maryland IS GRANTED, and the applications of Jerome Thomas Lamprecht (File No. BPH-820409AB), Dragon Communications, Inc. (File No. BPH-820421AK), and Port Royal Broadcasting, Inc. (File No. BPH- 820908AO) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS, *Member, Review Board*

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[10] Despite the ALJ's hyperbole concerning the comparative disadvantages of being a "white, Anglo-Saxon, male," we reject Lamprecht's charge that the ALJ converted female enhancement credit into a *per se* comparative determinant in the instant case. Femaleness is recognized by the Commission as a proper comparative enhancement factor, *see Horne Industries, Inc., supra*, and it has been given no more and no less than its due here. *Id.*

FCC 84D-42

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Jerome Thomas Lamprecht Middletown, Maryland	MM Docket No. 83-985 File No. BPH-820409AB
Dragon Communications, Inc. Middletown, Maryland	MM Docket No. 83-986 File No. BPH-820421AK
Barbara D. Marmet Middletown, Maryland	MM Docket No. 83-987 File No. BPH-820908AW
Port Royal Broadcasting, Inc. Middletown, Maryland	MM Docket No. 83-988 File No. BPH-820908AO
For Construction Permit for a New FM Station	

Appearances

John Wells King and *John P. Crigler* on behalf of Jerome Thomas Lamprecht; *Robert Lewis Thompson* on behalf of Dragon Communications, Inc.; *Harold K. McCombs* on behalf of Barbara D. Marmet; and *Jeffrey D. Southmayd* on behalf of Port Royal Broadcasting, Inc.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE WALTER C. MILLER

Issued: June 8, 1984; Released: June 14, 1984

1. Four mutually-exclusive applicants seek authority to operate a new FM broadcast station at Middletown, Maryland, on Channel 276A (103.1 MHz): Jerome Thomas Lamprecht (Lamprecht); Dragon Communications,

Inc. (Dragon); Barbara D. Marmet (Marmet); and Port Royal Broadcasting, Inc. (Port Royal).

2. After the interlocutory pleading circle had run its course, only one factual issue remained[1] - the standard comparative issue (48 F.R. 45598 published October 6, 1983, Issue 3). That issue reads:

> "To determine which of the proposals would, on a comparative basis best serve the public interest . . . "

3. The prehearing conference was held on January 9, 1984. The parties submitted their evidence on March 13 and 14, 1984. The record was closed on March 14, 1984. All four applicants filed their Proposed Findings of Fact and Conclusions of Law on April 27, 1984. Lamprecht, Marmet, and Port Royal filed Reply Findings on May 11, 1984. Dragon elected not to file Replies.

Findings of Fact

Descriptions of the Applicants

4. *Lamprecht.* Jerome Thomas Lamprecht is prosecuting BPH-820409AB as a sole proprietor. He is the 100% owner.

5. *Dragon.* Dragon Communications, Inc. has four stockholders. The following chart sets out the ownership details on Dragon's principals:

CHART

Name	*Office*	*Director*	*Ownership %*
Thomas Buffington	Chairman and President	Yes	51
Gary Hess	Vice-President	Yes	25
George Christopher, Jr.	Treasurer	Yes	12
Christine DeWitt and H.M. Lee DeWitt, Joint Tenants	Secretary	Yes —	12

6. *Marmet.* Barbara D. Marmet is prosecuting BPH-820908AW as a sole proprietor. She is the 100% owner.

7. *Port Royal.* Port Royal Broadcasting, Inc. has three stockholders. The following chart sets out the ownership details on those three principals:

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[1] On January 9, 1984, a 47 CFR 1.65 failure-to-update issue was added against Dragon at Port Royal's request. The burden of proceeding on that issue was placed on Port Royal. See FCC 84M-062. However, Port Royal defaulted under its burden of proceeding, and the issue became moot. See FCC 84M-1224, released March 13, 1984; and Tr. 45-47.

Chart

Name	*Office*	*Director*	*Ownership %*
Richard R. Leverrier	President	Yes	48
Mary Ellen Ferrel	Vice-President Treasurer	Yes	48
Nancy S. Southmayd	Secretary	Yes	4

Diversification of Mass Media

8. *Lamprecht* owns 300 shares of common stock in Jacor Communications, Inc. Jacor owns Station WTOW-AM, Towson, Maryland where Lamprecht works as General Manager and Vice-President. Jacor Communications, Inc. also owns WTSJ, Cincinnati, Ohio; WBOI, Toledo, Ohio; WURD, Georgetown, Ohio; and WKYG and WQAW-FM, Parkersburg, West Virginia. Lamprecht's 300 shares represent less than 1% of this publicly traded company. If granted Lamprecht will terminate his employment at Jacor, and there will be no formal or informal association between Jacor and the proposed station. In any event this *de minimis* ownership interest is not cognizable under existing Commission policy.

9. *Dragon.* Dragon itself has no broadcast or other mass media interests. However, some of Dragon's principals do. Thomas Buffington, Dragon's President, Director, and 51% owner, is also President, Director, and 100% owner of Thomas Buffington Associates, Inc. - an advertising agency and communications consultant firm. He intends to retain his 100% ownership and offices in TBA, Inc. even if Dragon is granted.

10. Gary Hess, Dragon's Vice-President, Director and 25% owner, is also President, Director, and 25% owner of: (1) Bay Area Communications Corp. (WFNN-AM, Dunedin, Florida); (2) Variety Broadcasting Corp. (WTAI-AM, WLLV-FM, Melbourne, Florida).

11. *Marmet.* Barbara Marmet has no other broadcast or mass media interests.

12. *Port Royal.* Neither Port Royal or any of its principals have any ownership interest in any medium of mass communications.

Integration of Ownership With Management

13. *Lamprecht.* Lamprecht claims 100% integration credit. He intends to be the proposed station's full-time General Manager. As the Owner-General Manager he will adopt and execute station policies, plan and implement the station's organizational structure, and recruit and hire key management personnel.

14. Jerome Lamprecht was born on May 25, 1954 in Baltimore, Maryland. He has lived in Baltimore all of his life. He will move himself and his family to Middletown if his application is granted.

15. Lamprecht was a full-time student at the University of Maryland from 1974-1977. There he majored in radio, television, and film. After starting full-time employment in broadcasting, he continued studying part-time. He got his Bachelor of Science degree in May, 1984. He now holds an FCC Restricted Radio-Telephone Operator Permit. He previously held an FCC Radio-Telephone Third Class Operator Permit with Broadcast Endorsement.

16. From June to September, 1976, Lamprecht worked as a full-time radio announcer at Station WRCH-FM, Williamsport, Maryland. In October 1976, he became a part-time announcer (12 hours per week) at WTOW-AM, Towson, Maryland.

17. He became a full-time announcer (35 hours per week) in January, 1977, and in April 1977, he was named Operations Manager and worked an average of 50 hours a week. Two months later he was promoted to Station Manager. Since 1978, Lamprecht has been General Manager of WTOW.

18. Lamprecht has never lived in the proposed service area and has never been involved in any of Middletown's civic activities.

19. *Dragon.* Quantitatively, Dragon asserts that its entitled to 88% full-time integration credit and 12% part-time credit. See Dragon P.F., 63. However, this assertion is totally inaccurate. The record doesn't support any integration claim for either Christine DeWitt or H.M. Lee DeWitt who jointly hold 12% of Dragon's stock. Moreover, Dragon's claim for 12% part-time credit for George Christopher, Jr. is also rejected. It's at variance with the integration statement Dragon filed in response to the Prehearing Order. See FCC 83M-3641, released October 17, 1982.[2] [3] So Dragon's application will be analyzed as if it were seeking 76% full-time integration.

20. Dragon will fully integrate Thomas Buffington, its President, Director, and 51% stockholder into the proposed station's day-to-day operations. Buffington will serve full-time as General Manager and act as the station's chief administrative and operating manager. He presently resides in Washington, D.C. If Dragon's application is granted, he will commute to Middletown on a daily basis. Thus he has no plans to become a local resident of Middletown.

21. Thomas Buffington was born in New Orleans, Louisiana in 1938. He received a B.S. in speech and communications from Columbia College of Chicago in 1959.

22. Buffington started his work career in Chicago in 1962 as a newspaper sales representative. From 1964 to 1967, he was a media buyer

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[2] See Dragon Communications, Inc.'s Response to Order Prior to Prehearing Conference filed October 24 1983, by President Thomas Buffington.

[3] In any event Christopher doesn't appear to be integrated into the station's day-to-day operation. He intends to remain a full-time partner in his accounting firm. See Tr. 225-227.

for Leo Burnett, Inc., Chicago. During 1967 - 1968 he worked on the sales staff of Station WIND. In 1968, he moved to New York City and sold advertising for WCBS-TV, and later (1969-1970) for TV Ad Reps. Between 1970 and 1974, Buffington did communications work for OEO, the John F. Small ad agency in New York, and Warner Cable Co.

23. In 1974, Buffington founded Thomas Buffington Associates, Inc., a full service advertising agency. The agency purchases program time on Washington area radio stations and provides programming to fill that time.

24. Buffington qualifies as a member of a minority group. He is Black.

25. Dragon also claims it will fully integrate its Vice-President and 25% stockholder, Gary Hess, into its day-to-day operation. He proposes to devote a minimum of 40 hours a week directing the station's operations and engineering. His current residence is Tarpon Springs, Florida. He claims he will relocate to the Frederick, Maryland area if Dragon's application is granted.[4]

26. Gary Hess was born in Philadelphia, Pennsylvania in 1948. He has been in broadcasting since 1966. Early on he worked as a staff announcer, assistant chief engineer, and chief engineer. In 1970, SJR Communications, Inc. hired Hess. He subsequently became SJR's director of engineering for the various radio stations that Corporation owned. When SJR reached its full complement of stations, Hess supervised about 24 employees.

27. In 1983, after SJR was liquidated, Hess, his boss Sylvan Tapinger, and Martin Spector formed corporations that acquired radio stations in Dunedin and Holiday, Florida. Hess is the General Manager of those stations. In February 1984, this same group acquired an AM/FM combination in Melbourne, Florida.

28. *Marmet.* Barbara Marmet claims 100% quantitative integration. As an individual applicant[5] she will work full-time as the proposed station's General Manager. In that role she'll be responsible for all the

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[4] This claim is being credited with a great deal of reluctance. Hess resided in Darnestown, Maryland from 1976 to 1983. In 1983, after Dragon had filed its application, Hess relocated to Florida. He has recently become the President, Director, and 25% stockholder in three Florida broadcast corporations and the General Manager of four stations. All four stations are located in much larger markets than Frederick, Maryland. Stated bluntly, it would be economically unwise for Hess to relocate to Frederick in such a short time. Nevertheless, Hess' testimony will be honored.

[5] Both Marmet's husband and her son-in-law, Harold McCombs, are communications attorneys. However, she has applied for the construction permit for the Middletown FM station as an individual. The funds she has expended and which will be expended to construct and operate that station are her own separate funds. They are funds she has received independently and maintained separately from her husband's funds. There is no understanding or agreement, express or implied, that would dilute her sole ownership. She alone will be responsible for the station's operation. Stated another way, based on the

station's functions; she will hire, direct, and supervise all employees; and she will prepare or supervise the preparation of all editorials.

29. In her application, Marmet listed her residence as being 2932 Thurston Road in the Urbana area of unincorporated Frederick County. So her principal residence is within her 3.16 mV/m contour. Her opponents have attacked that residence claim. But those attacks will be rejected. Marmet bought the house at Thurston Road back in 1976 - well before she filed her application in this case. Since it was an historic landmark, she started *restoring* the house the following year. In 1979 she started to claim it as her principal residence. Both she and her husband are registered to vote and do vote in Frederick County. Since 1979 she and her husband have filed joint tax returns that declare 2932 Thurston Road as their residence. So while her opponents have brought out some facts which could possibly lead to an argument that she has a dual residency her principal residence representation will be honored.

30. Born in Omaha, Nebraska in 1925, Barbara Marmet is a graduate of Bradford College and the University of Michigan where she received a BA in Liberal Arts, majoring in Sociology.

31. She has business experience. Between 1947 and 1976, she worked on several different projects. From 1960-1966, she served as area representative for the Bradford College Admissions Office. In that capacity she visited secondary schools and interviewed student applicants in the mid-Atlantic region. From 1960 to 1976, Marmet was on the Board of Directors of the Planned Parenthood of Metropolitan Washington. She was its full-time Treasurer from 1974-1976. Between 1977-1979 she was on the Board of the Homemakers Health Aide Services (Washington, D.C).

32. Marmet worked as a part-time bookkeeper with her husband's law firm from 1967-1970, and held the same position in Thomas Jefferson, Inc. from 1970-1975. Thomas Jefferson, Inc. was a small real estate management company in which she was a stockholder. Marmet owns several pieces of real estate. She manages some of those parcels through a real estate partnership, Ogden and Marmet.

33. Turning to civic participation, Marmet is the only applicant who engages in Frederick County civic activities.[6] She has been a member of Frederick County Landmarks Foundation, Inc. since 1977. The Foundation encourages people to restore historic landmarks within Frederick County. It awarded Marmet a plaque for restoring the home in which she

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record evidence, and having observed her demeanor, the Presiding Officer is satisfied that Barbara Marmet is a *Feme Sole Trader*.

[6] Richard Leverrier, of Port Royal, *infra.*, tried unsuccessfully to claim credit for his membership in the Middletown Chapter of AMVETS. That claim was rejected. See Tr. Vol. 263-265; and FCC 84M-1893, released April 18, 1984.

presently lives. Since 1980 she has been a member of Community Commons - a Frederick County environmental group. She has also been a Patron of the Frederick County Symphony Society since the 1980-1981 season.

34. Marmet has no broadcast experience. She claims integration enhancement as a female.

35. *Port Royal.* PRB claims 100% quantitative integration. It intends to integrate all three of its shareholders into the proposed station's day-to-day operation.

36. First, PRB would fully integrate its President and 48% stockholder, Richard R. Leverrier, into its daily operation. Leverrier will work a minimum of 40 hours a week as General Manager. He will supervise the overall operation, and make the final decisions on programming and station policies. Leverrier resides in Bethesda, Maryland - outside the proposed service area. Moreover, if PRB's application is granted, Leverrier will *not* move to Middletown. Rather he will commute daily from his Bethesda residence.

37. Richard Leverrier was born in Rochester, New York on January 10, 1950. But he has spent most of his life in the Washington, D.C. metropolitan area. After high school, he attended the University of Dayton, in Dayton, Ohio for about two years.

38. Leverrier's work experience and broadcast experience coincide. From 1970 to 1977, he was an account executive at WGMS-AM and FM. He became General Sales Manager at WRC(AM), Washington, D.C. in 1977. He held that position until 1979 when he became an account executive to WPGC AM-FM, Morningside, Maryland. In 1980 Leverrier returned to WGMS AM-FM, as an account executive. He is there at the present time. He will leave this position to work at the Middletown FM station if PRB's application is granted.

39. Secondly, PRB would fully integrate its Vice-President-Treasurer, and 48% stockholder, Mary Ellen Ferrel, into its day-to-day operations. Ferrel would serve as Operations Manager, and would devote a minimum of 40 hours a week to that position. She will manage the station financially, but she'll also have a decisional input into programming and other station policies. She will also hire and fire station personnel, and manage the station when the General Manager is absent. Mrs. Ferrel resides in Chevy Chase, Maryland with her husband and two young children. Her residence is outside the proposed service area. Moreover, if PRB is granted, Ferrel will *not* move to Middletown. Rather she will commute daily from Chevy Chase.

40. Mary Ellen Ferrel was born on February 8, 1954 in Worcester, Massachusetts. After graduating from High School in 1972, she enrolled

in the Foreign Service School of Georgetown University. She graduated from Georgetown in 1976.

41. From 1976 to 1980 she worked full-time as an office assistant at the architectural firm of Deupi and Associates, Washington, D.C. There she supervised client billing, prepared the office payroll, and kept pertinent financial records. From 1980 to 1981 she was an administrative assistant at Georgetown University's Office of Development. She has been a mother and housewife since that time.

42. Mrs. Ferrel has no broadcast experience. She claims integration enhancement as a female.

43. Finally, Port Royal claims it will fully integrate its Secretary and 4% stockholder, Nancy S. Southmayd, into its day-to-day operation. Southmayd will devote a minimum of 40 hours a week as Sales Manager. In that capacity she'll be responsible for the overall sales program. She'll also have a decisional input into programming and other station policies. Southmayd resides with her husband and two children,[7] in Rockville, Maryland - outside of PRB's proposed service area. Moreover, if PRB's application is granted, Southmayd will *not* move to Middletown. Rather she will commute daily from her home.[8]

44. Nancy S. Southmayd was born in Washington, D.C. on April 22, 1951, and has resided in the Washington metropolitan area her entire life. After graduating from high school in 1969, she attended Lynchburg College, Lynchburg, Virginia until 1971. From 1971 to 1972, she was a student at Washington School for Secretaries.

45. From 1972 to 1975, Southmayd was employed in the commercial insurance department of Weaver Brothers in Chevy Chase, Maryland. She did administrative/secretarial work and sold commercial insurance. In 1973, she became a licensed property and casualty insurance agent. From 1976 to 1981, Southmayd was the Executive Assistant to the Executive Vice-President of the Artery Organization, a builder/developer in Chevy Chase. There she prepared sales contracts and settlement papers for the sale of residential real estate. She became a licensed Maryland real estate agent in 1977, and worked part-time in that capacity for Colquitt-Caruthers until 1979.

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[7] The Southmayds expect their third child in September, 1984.

[8] Not just in this case, but in an increasing number of comparative cases, the Presiding Officer gets a deep-rooted impression that many applicants are setting down integration proposals they do not seriously intend to keep, or if they do intend to keep them it will only be for a short time period. Stated another way, an increasing number of applicants are totally ignoring the Commission's admonition in *Tidewater Teleradio, Inc.*, 24 RR 653 (1962) at paras. 6-7. Southmayd's integration promises, like Gary Hess' (see Footnote 4) are being credited although the Presiding Officer seriously doubts she'll go through the day-to-day hassle for a 4% stock interest.

46. Southmayd quit working full-time in 1981. She is not currently employed full-time other than as a housewife and mother. However, since 1981, she has worked part-time for her husband's law firm for six months in 1981; worked full-time for a real estate company for six months in 1982; and has recently done some bookkeeping for her husband's law firm.

47. Mrs. Southmayd has no broadcast experience. She claims integration enhancement as a female.

Auxiliary Power

48. Marmet and Port Royal propose to acquire, install, and maintain an auxiliary power generator. Lamprecht and Dragon do not.

Comparative Coverage

49. All four applicants propose maximum Class A FM facilities. The transmitter sites would be located between 0.62 and 2.57 miles from each other. While this would result in some predicted 60 dBu differential areas, the areas and population differences are insignificant. Moreover, none of the differential areas are unserved or underserved. So no comparative coverage preference is warranted.

Preliminary Conclusions

1. Jerome Thomas Lamprecht (Lamprecht), Dragon Communications, Inc. (Dragon), Barbara D. Marmet (Marmet), and Port Royal Broadcasting, Inc. (Port Royal or PRB) are vying for an FM station in Middletown, Maryland on Channel 276A (103.1 MHz). Only one of the four can be granted. Under the standard comparative issue we must determine which one it will be.

2. The four applicants will be analyzed under the criteria and factors set out in the Commission's *1965 Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393. There the Commission indicated that the comparison should be directed toward two primary objectives: (1) selecting the applicant that will offer the greatest diffusion of control of mass communications media; and (2) selecting the applicant that will offer the best practicable service to the public.

3. *Diversification of Mass Media.* Diversification is a factor of primary significance. It is the primary objective toward which the comparative process is directed. Neither Lamprecht, Marmet, or Port Royal have any cognizable mass media interests. So none of these three warrant a diversification preference as against the other. However, all three merit a preference over Dragon.

4. Dragon's Vice-President and 25% stockholder, Gary Hess, is President and a 25% stockholder in WFNN(AM), Dunedin; WVTY(FM), Holiday; WTAI(AM) and WLLV(FM), Melbourne - all in Florida. In addition, Dragon's President and 51% stockholder, Thomas Buffington, is

and will continue to be President and 100% stockholder of Thomas Buffington Associates, Inc., a communications consulting/advertising agency firm in Washington, D.C. Buffington's interest is cognizable. See *Eastern Broadcasting Corp.*, 30 FCC 2d 745, 753, *review denied* 32 FCC 2d 187 (1971); *Mid-Florida Television Corp.*, 69 FCC 2d 607, 649 (R. Bd. 1978); and *Berryville Broadcasting Co.*, 70 FCC 2d 1, 15 (R. Bd. 1978). Hess' and Buffington's interest warrant assessing Dragon a healthy comparative demerit vis-a-vis the other three applicants. While the demerit isn't decisional, it is substantial enough to place Dragon at the back of the comparative pack.

5. *Best Practical Service to the Public.* In deciding which applicant will offer the best practical service to the public, five criteria must be considered: (1) the degree each will integrate corporate ownership into the day-to-day management of the station (Quantitative Integration); (2) the attributes each of the integrated owners will bring to that day-to-day management (Qualitative Integration); this includes such factors as past broadcast experience; past education and business experience; local residence; and past participation in civic affairs in proposed service area; (3) whether the degree of quantitative and qualitative integration each will bring is enhanced by minority or female ownership; (4) whether an applicant will provide an auxiliary power supply to assure continuous operation if a power failure occurs; and (5) whether any applicant deserves a preference because of a superior areas and population proposal.

6. *Quantitative Integration.* Lamprecht claims and is entitled to 100% integration. He will be both a 100% owner and the station's full-time General Manager. Marmet claims and is entitled to 100% quantitative integration. She will be both a 100% owner and the station's full-time General Manager. Port Royal claims and is entitled to 100% quantitative integration. It will integrate all three of its stockholders; i.e., Richard Leverrier, Mary Ellen Ferrel and Nancy Southmayd. However, Dragon is only entitled to 76% quantitative integration. It has been credited with integrating its President and 51% stockholder, Thomas Buffington, and its Vice-President and 25% stockholder Gary Hess.

7. At this juncture an intermediate conclusion is warranted: Dragon is out of the running and will be given no further comparative consideration. Its diversification demerit when combined with its subaverage quantitative integration proposal places it so far back that no useful purpose would be served in analyzing its qualitative integration attributes.[9]

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[9] Note, however, that comparative findings have been made on all facets of Dragon's comparative proposal. See Findings 19-27 *supra*. It is only further comparative conclusions that aren't required. See *Cannon's Point Broadcasting Company*, 93 FCC 2d 643 (R. Bd. 1983) at 649.

8. *Qualitative Integration.* Here Marmet is entitled to a slight preference over Lamprecht. Lamprecht, in turn, is entitled to a qualitative preference over Port Royal. Marmet has no broadcast experience. But her past education and overall business experience permits the conclusion that she could adequately manage a broadcast operation. Her qualitative strength lies in her local residency within the proposed 3.16 mV/m contour, and her civic involvement in Frederick County since 1979.[10]

9. Lamprecht lacks civic participation, and local residence, although he promises to establish a future residence in Middletown if he's granted. His qualitative integration is enhanced by both his broadcast education and broadcast experience. That experience includes a substantial amount of experience in broadcast management - both as an Operations Manager and Station Manager.

10. Port Royal's integration is qualitatively inferior to both Marmet and Lamprecht. None of its principals reside within the proposed 3.16 mV/m contour, and none have been civically active in Frederick County. In fact, none of the three intend to establish residence in Frederick County even if Port Royal is granted. The only principal who has past broadcast experience is Leverrier, a 48% stockholder, and that experience has been principally limited to broadcast sales.

11. *Minority or Female Enhancement.* Marmet is entitled to a substantial preference on this score. Her already strong 100% integration showing is enhanced by her female participation in the station's top management slot; i.e., the General Manager.

12. Port Royal is entitled to 52% female enhancement: 48% for Mary Ellen Ferrel and 4% for Nancy Southmayd. However, neither of those women are slated to be the General Manager. On this criterion, Lamprecht suffers from a birth defect: he was born a white, Anglo-Saxon, male. They are not in demand under the Commission's present deregulatory, comparative scheme.[11]

13. *Auxiliary Power.* Both Marmet and Port Royal proposes auxiliary power. Lamprecht does not. So they are entitled to a slight additional comparative preference over Lamprecht. See *Addendum to Policy Statement on Comparative Broadcast Hearings*, 2 FCC 2d 667 (1966).

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[10] It has been argued that Marmet can hardly be considered a paragon of civic participation. That may be true. But she is a Patron of the Arts, and has shown an interest in Frederick County's environmental problems.

[11] There was a day, in the dim and distant past, when Lamprecht might well have prevailed in this comparative contest. His educational background is broadcast oriented. He has both management and non-management broadcast experience. He is a young man who appears aggressive enough to make a substantial contribution to his chosen career. In short, he's ready for an ownership role. But, in this day and age, it is doubtful that he could win any comparative proceeding.

14. *Comparative Coverage.* No one is entitled to a comparative preference under this criterion. See Finding 49 *supra.*

Ultimate Conclusion

15. Barbara Marmet prevails under the standard comparative issue. Her 100% quantitative integration, strengthened by her local residence and civic participation, enhanced by her female participation as the station's proposed General Manager, and augmented by her auxiliary power proposal, is markedly superior to either Lamprecht's or Port Royal's. She is a comfortable comparative winner. So it is concluded that Barbara Marmet will offer the best practicable service to the public in the Middletown, Maryland area, and her application will be granted.

SO, unless an appeal is taken from this Initial Decision or the Commission reviews it on its own motion, Barbara D. Marmet's application (BPH-820908AW) IS GRANTED; and

Jerome Thomas Lamprecht's (BPH-820409AB), Dragon Communications Inc.'s (BPH-820421AK), and Port Royal Broadcasting, Inc.'s (BPH-820908A) applications ARE DENIED.[12]

FEDERAL COMMUNICATIONS COMMISSION

WALTER C. MILLER, *Administrative Law Judge*

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[12] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, the Initial Decision will become effective 50 days after its public release. See 47 CFR 1.276(d).

Application, Defective

Application for review denied. A low power television or television translator application which is found to cause interference to an existing television translator station is defective and unacceptable for filing.
Las Manzanas TV Co.

Application, Processing of
Television, Low Power
Translator

While low power television rulemaking pending, action on mutually exclusive applications deferred but applications that were not mutually exclusive were processed to grant. Low power television or television translator authorizations made during the pendency of low power television rulemaking will not be re-examined using interference prediction criteria established by that rulemaking for new and pending CP applications.
—Las Manzanas TV Co.

Application, Acceptance of

A major amendment to a pending low power television or television translator application to change technical specifications to avoid interference to an authorized facility permissible during the 90-day amendment period as set forth in June 23, 1982, *Public Notice.*
—Las Manzanas TV Co.

FCC 84-570

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Application of Las Manzanas Television Company For Construction Permit for a New Low Power Television Station on Channel 53 Seattle, Washington	File No. BPTTL-801202JG

MEMORANDUM OPINION AND ORDER

Adopted: November 21, 1984; Released: January 11, 1985

BY THE COMMISSION:

1. The Commission has under consideration an Application for Review filed December 15, 1983, by Las Manzanas Television Company ("Las Manzanas") seeking review of an action by the Mass Media Bureau denying Las Manzanas' Petition for Reconsideration, for Reinstatement of Application *Nunc Pro Tunc*, and for Termination of Mutually Exclusive Authorization and returning the above-captioned application as unacceptable for filing. An Opposition to Application for Review was filed by KIRO, Inc. ("KIRO"), licensee of television translator station K53AZ, whose authorization Las Manzanas seeks to have terminated. A reply was filed by Las Manzanas. In order to provide a full opportunity for the complete presentation of issues, we will consider Las Manzanas' reply herein.

2. By way of background we note that, shortly after the release of the *Notice of Proposed Rule Making in Low Power Television Service*, 82 FCC 2d 47 (1980) (NPRM), the Commission issued an order delineating the procedures to be followed in processing translator applications in the interim period before resolution of the low power television proceeding. *Interim Processing Order*, 48 RR 2d 291 (1980). At that time, the Commission's rules contained only broad guidelines concerning the protection that a television translator should afford to another translator's service area. Specifically, Section 74.702(e) stated that television translator applications that obviously would result in interference would not be granted. Under the interim procedures, applications were to be processed using these existing rules. Applications for conventional television translator service and for translator service with low power features would thus be examined individually to determine whether each application could be granted. The Commission subsequently issued a Further NPRM which proposed a contour overlap method for predicting interference and mutual exclusivity for low power and translator television applications. The Commission stated, however, that the proposed method of determining permissible interference would not be used as an interim processing standard. *Further Notice of Proposed Rule Making*, 46 Fed. Reg. 42478, 42480 (1981).

3. KIRO filed its application for a television translator on channel 53 at Centralia, Washington, on August 14, 1981. KIRO was already licensed and operating a television translator at Centralia, Washington, on channel 78 and sought to change operation to channel 53 due to potential interference with operations in the land mobile radio service. The staff examined KIRO's application under the interim procedures and found that, under the rules then in effect, the application was not mutually

exclusive with any other application, including Las Manzanas' low power proposal. Therefore, KIRO's application was granted on January 20, 1982.

4. Las Manzanas filed its application for low power television service on December 2, 1980, pursuant to the above-described interim procedures. It proposed to operate on Channel 53, Seattle, Washington. This application, however, was found by the staff to be directly mutually exclusive with the application of Trinity Broadcasting of Seattle, Inc. (BPTT-801017IE) for a new television translator on channel 52 which had been filed two months earlier. Low power television and television translator applications for adjacent channels in the same community created a situation of apparent mutual exclusivity under the processing rules in effect at that time. Moreover, before Las Manzanas' application was accepted for filing or placed on a cutoff list, several more directly competing applications were filed for Seattle, Washington, on Channel 53: Community Service Television Company, BPTTL-810116OG and Public Management Information Service, BPTTL-810304IA; and on channel 52: Ventures in Communications, Inc., BPTTL-810116OT, and Frontier Mountain Broadcasting, Inc. BPTTL-810217AY. Because the comparative criteria for translator and low power applications were to be developed in the low power television rulemaking, no mutually exclusive applications were processed during the pendency of that proceeding. *NPRM*, 82 FCC 2d at 78; *Interim Processing Order*, 48 RR 2d at 292. In light of this, Las Manzanas' application was not processed until completion of the rulemaking.

5. On March 4, 1982, the Commission adopted the *Low Power Television Report and Order*, 51 RR 2d 476 (1980) (*Report and Order*). The Commission's new rules discontinued the individual judgmental standard for predicting interference among translator and low power applications. Instead, the Commission implemented a computerized contour overlap method for predicting interference among the thousands of pending applications. The new criteria also provided, among other things, that an application for low power television would not be accepted if it specified a site within the protected contour of a co-channel television translator station. *See* 47 C.F.R. §74.707. In adopting these new rules, however, the Commission recognized the probability that pending applications which did not cause interference to existing stations under the previous judgmental standard, might now do so under the contour overlap method for predicting interference. Therefore, the Commission afforded all pending applicants, such as Las Manzanas, a 90-day period during which they could file major or minor amendments to bring their applications into compliance with the newly adopted technical and engineering standards. *Report and Order*, 51 RR 2d 476, 503-04; *Public Notice*, 51 RR 2d 1275 (1982). Such amendments were subject to an

adequate showing by the applicant that the application involved an engineering conflict with an existing broadcast station that precluded the grant of the proposal without the amendment.

6. Subsequent to the 90-day amendment period, the staff examined the pending application of Las Manzanas under the new criteria. It found that the proposal would cause objectionable interference to KIRO's licensed television translator station K53AZ. Because Las Manzanas had not amended its application to eliminate the prohibited interference, the application was returned as unacceptable for filing on July 22, 1983. Similarly, on November 2, 1983, the Bureau denied Las Manzanas' Petition for Reconsideration, Reinstatement of Application Nunc Pro Tunc, and Termination of Mutually Exclusive Authorization.

7. In its application for review, Las Manzanas contends that the Mass Media Bureau erred in rejecting its application and that review of this action is warranted based on the Bureau's violation of applicable statutes, regulations, case precedent and established Commission policy. Specifically, Las Manzanas argues that: (1) the Bureau violated the Commission's interim processing rules in granting KIRO's application for television translator station K53AZ; (2) the Bureau's rejection of Las Manzanas' application violated its *Ashbacker* rights[1] ; and (3) refusal to consider the applicant's tentative plan regarding frequency offset operation to eliminate interference with KIRO was arbitrary and violative of Commission policy favoring such agreements.

8. From the preceding discussion, it is apparent that the Bureau's grant of KIRO's application did not violate the interim processing rules. At the time of grant, KIRO's application complied with all technical and other rules then in effect. It was not subject to the proposed "contour overlap" rules for predicting interference that were subsequently adopted by the Commission. *See* paras. 2 and 3, *supra*. We thus find no basis for concluding that the grant of KIRO's application was in any way improper.

9. Alternatively, Las Manzanas argues that KIRO's grant should now be rescinded because all interim grants were "conditioned" upon the outcome of the low power rulemaking and KIRO's operation would not have complied with the contour overlap rules ultimately adopted.

10. The Commission's *Interim Processing Order* did state that low power and translator applications would be conditioned upon the outcome of the low power proceeding. *Id.* at 292. We disagree, however, that that language was intended to require recision of interim translator grants such as the one made by KIRO. It should be noted that the Commission's statements regarding the "conditioning" of interim grants were made prior to the Commission's adoption of the *Further NPRM* proposing a new method of determining permissible overlap standards for translator

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[1] *Ashbacker Radio Corp. v. FCC,* 326 U.S. 327 (1945)

and low power stations. Thus, no inference may be drawn that the Commission's language necessarily contemplated the withdrawal of grants like KIRO's, which were consistent with the judgmental standard then being applied to interim applications. And certainly the Commission's *Further Notice*, which expressly stated that the proposed contour overlap technical rules were inapplicable to interim grants, did not in any way suggest that interim translator proposals might later be reprocessed or rescinded if the new technical standards ultimately were adopted. Indeed, the reading suggested by Las Manzanas would have been inconsistent with fundamental principles that had guided the Commission in developing interim processing procedures. To avoid significant disruptions later, or the necessity of "grandfathering in" non-conforming interim low power stations, the Commission had declined generally to process applications that were inconsistent with the proposed low power rules. For example, the Commission deferred action on applications that were inconsistent with the multiple ownership rules proposed at the time of the *Interim Processing Order*. This was not true, however, with respect to applications inconsistent with the overlap rules. If the Commission had intended to subject interim applications to the contour overlap standard, our policy of avoiding later disruptions would have dictated a freeze on applications that departed from the contour overlap standard. We processed such non-conforming applications, however, consistent with our intention that interim grants would at no time become subject to the "contour overlap" aspect of the low power proceeding.

11. Finally, we note that one of our primary objectives in allowing interim authorizations was to ensure that traditional translator stations could continue to be authorized during the pendency of the low power proceeding. Thus, we noted that:

> A freeze on all translator applications pending a report and order in this proceeding would deprive the public of needed service, as well as creating a backlog of applications that could take additional months or even years to process.... If we ultimately decide not to pursue the proposed service at all, conventional translator applications nevertheless would have become backlogged, to the detriment of those communities having the most acute service needs.

An Inquiry into the Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications System, 48 RR 2d 1197, 1204 (1981). In light of these objectives, we think it is clear that the Commission did not intend to re-examine interim authorizations using the contour overlap method, thereby increasing the backlog of applications and possibly causing discontinuance of properly authorized translator service.

12. In deciding to defer action on some interim applications, however, the Commission did seek to ensure that no substantive rights of interim applicants would be jeopardized by the "freeze." *See Interim Processing*

Order at 292. Las Manzanas apparently believes that, as a result of our interim freeze on processing mutually exclusive applications, its application, but not KIRO's, was subjected to the new contour overlap standards, which deprived it of an opportunity to be considered in comparative proceedings with KIRO. Indeed, in *Neighborhood TV Company, Inc. v. FCC,* No. 83-1724, slip op. at n. 11 (D.C. Cir. 1984), the court considered a similar claim and suggested that, in isolated cases, interim processing might have had indirect effects on applicants' *Ashbacker* rights. For several reasons, however, we are not persuaded that Las Manzanas is entitled to relief. First, even without the freeze, KIRO's unopposed proposal might have been processed before Las Manzanas', with the result that one applicant, but not the other, became subject to the new contour overlap rules: Las Manzanas' application was mutually exclusive with five other competing applications, and comparative proceedings to select the winning applicant might well have taken several years. Thus, it is by no means clear that, except for the interim "freeze" on processing of mutually exclusive translator and low power applications, Las Manzanas' and KIRO's applications would have been governed by the same rules for determining permissible interference.

13. More importantly, after completion of the *Low Power* proceedings and adoption of the new contour overlays standard, the Commission afforded all applicants a full opportunity to amend their applications to comply with the new standard and remove any conflicts with existing stations. By permitting such amendments, the possibility of any prejudice to pending applications as a result of the new standard could be avoided. Las Manzanas failed to take advantage of this 90-day amendment opportunity, which might have allowed it to resolve the conflict with KIRO. Indeed, Las Manzanas does not contend in this proceeding that the conflict with KIRO could not have been resolved by an appropriate amendment. In the face of Las Manzanas' failure to act, we believe that no equities have arisen in its favor that would justify our now rescinding KIRO's authorization or taking other action. Through the interim procedures, we sought to accommodate a variety of competing public interest considerations. While not all those competing interests could be accommodated perfectly, we believe that the measures we instituted, including the 90-day amendment period, afforded adequate protection to applicants like Las Manzanas, consistent with attainment of our other goals and objectives. Any impairment of Las Manzanas' rights, we believe, stemmed from its own failure to protect its interests by utilizing those procedures.

14. Finally, Las Manzanas claims that the Bureau erred in refusing to consider a purported agreement regarding frequency offset operation to eliminate interference with KIRO. A written agreement between KIRO and Las Manzanas has never been submitted to the Commission. Apart

from that, the general terms of the purported agreement as described in the pleadings were contrary to Commission rules and policy. The agreement proposed that Las Manzanas would amend its application to specify a frequency offset, and resubmit this amended application. However, the Commission has consistently held that low power television and television translator applications that are properly returned as unacceptable for filing may not be amended and resubmitted *nunc pro tunc. See e.g., Kinetications, Inc.*, 56 RR 2d 1402 (1984).

15. Furthermore, the purported agreement proposed that if Las Manzanas won the subsequent lottery, KIRO would then modify its authorization to specify frequency offset. This contingent arrangement would have the Commission accept Las Manzanas' application even though it presently is in violation of the Commission's rules. If an existing low power television or television translator station modifies its facility to specify frequency offset prior to the processing of a low power or television translator application, the modification would of course be considered in the interference studies involving the pending application. However, an agreement between an applicant and the licensee of an existing station, promising future actions to remedy predicted interference, cannot make the application acceptable for filing. Acceptance of a pledge or agreement promising to eliminate interference in the future would completely disrupt low power television application processing by making it impossible to predict accurately interference caused by most, if not all, such applications, not just the application in question. One application can directly or indirectly affect hundreds of other applications in a daisy chain effect. Each change in information contained in an application or modification of an existing facility requires alterations to the engineering and/or directional antenna data bases and additional computer and staff analysis to determine mutual exclusivity between applications and existing stations. Allowing a tentative future modification to an existing station would result in the acceptance for filing of applications that are patently not in compliance with the predicted interference standards, in violation of Section 73.3566 of the Commission's Rules.[2] Moreover, the tentative future modification of an existing station would require that two engineering studies be performed for interference prediction, one using the station's present operation and one employing the proposed modification. Alternative studies would then be necessary for every other low power television application that was directly mutually exclusive with the existing station to gauge the effect of the tentative modification on the acceptability of those applications. As a

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[2] Section 73.3566 of the Commission's Rules provides in pertinent part, "Applications which are determined to be patently not in accordance with the FCC rules . . . will be considered defective and will not be accepted for filing."

result, a great number of applications would have to be processed at least twice due to just one tentative modification to an existing station. This double processing would greatly delay the processing of all low power television and television translator applications. In view of the foregoing, acceptance of the proposed agreement would certainly be contrary to the public interest and violate Commission policy and rules.

16. Accordingly, IT IS ORDERED, That pursuant to Section 1.115 of the Commission's Rules, the Application for Review filed by Las Manzanas Television Company IS DENIED.

17. IT IS FURTHER ORDERED, That the Mass Media Bureau send a copy of this *Memorandum Opinion and Order* by Certified Mail - Return Receipt Requested to the applicant named herein.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Broadcast License, Property Right of
Diversification of Control of Mass Media
License, Property Rights in
Minority Ownership of B/C Facilities
Ownership, Minority

Commission declined to adopt proposed change in Rule 73.1150. Allowing a seller-creditor to retain an automatic reversionary interest in the license in a seller-financed sale of a broadcast property to a minority buyer is barred by statute.
—*Minority Ownership in B/cing*
GEN. Docket No. 82-797

FCC 84-647

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting	General Docket No. 82-797

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 21, 1984; Released: January 8, 1985

BY THE COMMISSION:

1. Before the Commission for consideration are comments filed in response to the *Notice of Proposed Rule Making* ("*Notice*") in the above-captioned proceeding.[1] The *Notice* solicited comments with respect to permitting alternative security arrangements in seller-financed sales of broadcast properties to minorities.

Background

2. The Commission has long supported increased minority participation and ownership in the broadcast industry. Such participation benefits not only minorities, but the general public as well, by diversifying control of the media and thus the selection of available programming. According-

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[1] *Notice of Proposed Rule Making* in Gen. Docket 82-797, 48 Fed. Reg. 5976 (February 9, 1983).

ly, the Commission is firmly committed to the goal of encouraging minority participation in the broadcast industry. In 1981, we created the Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications (Advisory Committee) in furtherance of this goal.[2] The Advisory Committee examined regulatory and economic conditions thought to hinder minority acquisition of telecommunication properties and its *Report*[3] offered a number of proposals designed to enhance minority ownership. Several of these proposals, such as the expanded use of distress sales and the broader availability of tax certificates, have already been adopted.[4] This *Report and Order* deals with the Advisory Committee's proposal concerning the possible expansion of seller-creditors' rights in seller-financed transactions.

3. The Advisory Committee found that obtaining "financing [particularly] has remained the greatest obstacle" to minorities' entrance and establishment in the telecommunications industry. In this regard, the Advisory Committee observed:

> many minority broadcasters do not know how to obtain financing and financial institutions have misconceptions about potential minority broadcasters . . . . [Also] the small or minority entrepreneur . . . does not have access to fixed rate long-term funds. As a result, that entrepreneur is subject to the vicissitudes of short-term rates.[5]

The Advisory Committee recommended that seller-financing, already prevalent in broadcast-sale transactions, be further encouraged "particularly since it is obviously one of the ways that minorities can obtain broadcasting properties."[6] Specifically, the Advisory Committee proposed the Commission expand the options accorded seller-creditors to include the right to retain a reversionary interest in the license of the station being sold.

4. The Commission's current Rule, found at 47 C.F.R. §73.1150, prohibits agreements, express or implied, which permit a broadcast licensee to: (1) retain an interest in the license; (2) claim a right to future assignment of the license; or (3) reserve a privilege to use the broadcast facilities, upon the sale or transfer of its interest in a station. In addition, as we observed in the *Notice*, the Communications Act of 1934, as

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[2] The Advisory Committee was comprised of leaders in both the private and public sectors of the financial and telecommunications communities.

[3] *Strategies for Advancing Minority Ownership Opportunities in Telecommunications*: The Final Report of the Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications to the Federal Communications Commission (May 1982) (hereafter "*Report*").

[4] *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting,* 48 Fed. Reg. 5943 (February 9, 1983) (hereafter "*Policy Statement*").

[5] *Report* at 25-26.

[6] *Notice* at 5976.

amended, and longstanding Commission precedent, as affirmed by the United States Supreme Court, appear to support this prohibition.[7] However, the *Notice* also stated that:

> we believe it appropriate to inquire as to whether certain limitations could be removed, consistent with the provisions of the Communications Act, so as to further encourage the use of this financing tool, particularly where the transaction would enhance minority ownership of the mass media communications.

the *Notice* solicited comments from the public on this proposal, specifically inviting interested parties to address the following:

> the type of security interest that may be retained by a seller-creditor; whether that interest can or should include a reversionary interest in the license itself; and the legal process, if any, that should be required before the creditor could exercise its reversionary interest.

Comments

5. Parties supporting the expansion of seller-creditors' rights argued that the proposed rule was necessary to stimulate minority acquisition of broadcast properties.[8] These commenters asserted that because the physical assets of a station rarely represent more than a small portion of the purchase price, reliance on a security interest in only those physical assets forces a seller-creditor to place his own capital at significantly greater risk. To minimize the risk associated with severe under-collateralization, supporters of the proposed rule favored allowing a seller-creditor to retain a reversionary interest in the license. By allowing collateralization of the *actual* value of the station, *i.e.*, the physical assets plus the goodwill/going concern value, the Commission could provide an added inducement for the sale of broadcast properties to minority purchasers.

6. Columbia Broadcasting Systems, Inc. (CBS) contended that permitting a reversionary interest in a station in furtherance of important public policy goals would not confer a property right in the seller, but would merely create a priority of interests as between the seller and purchaser before the Commission. In the event of a default, CBS acknowledged that the transfer and return of the station to the seller would still require Commission approval.[9] Thus, CBS claimed, the proposed rule would not be in violation of the prohibition against a property right in the license itself. CBS also noted that the Commission could waive the multiple ownership rules if the seller had subsequently purchased another station, subject to the condition that the station be resold within a fixed time period.

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[7] For a detailed discussion, *see Notice* at 5977.

[8] Comments supporting the proposed rule were submitted by: Bone and Woods, Columbia Broadcasting Systems, Inc., and National Radio Broadcasters Association.

[9] NRBA also suggested that the reversionary interest could only be conveyed with Commission approval. Bone and Woods recommended, however, that the Commission approve the terms of the reversionary interest at the time of the initial transfer.

7. National Radio Broadcasters Association (NRBA) urged easing current restrictions on seller-financed broadcast property transactions for all potential buyers, noting that the Commission has recognized the free transferability of broadcast stations to be in the public interest. Bone and Woods added that the scope of the rule making should be expanded to include third party financing in addition to seller-financing, to better enable minority broadcasters to obtain bank loans.

8. Parties opposing the expansion of seller-creditor's rights relied upon the Communications Act and long established Commission and judicial precedent which, they argued, conclusively negated the possibility of a reversionary interest in a broadcast license.[10] They noted that since there can be no property right in a broadcast license, it cannot be the subject of a reversionary interest. Furthermore, parties opposing the rule argued that no such reversion could occur absent formal application for transfer and an affirmative public interest finding by the Commission. To do otherwise, they warned, would permit a mortgage holder to circumvent the public interest standard by obtaining a license simply because a licensee defaulted on a mortgage.

9. Both the National Association of Black Owned Broadcasters (NABOB) and Citizens Communications Center (Citizens) also asserted that the rule would fail to achieve its intended purpose, and would, in fact, actually undermine the independence of minority owners. Specifically, Citizens warned that "[s]ince the benefits to the public of minority ownership flow from the minority owner's control of the broadcast facility, these benefits would be reduced by allowing reversionary interests."[11] Citizens also noted that the operation of the seller's reversionary interest would foreclose the possibility of a new minority owner purchasing the broadcast property.

10. In addition to the above-noted objections, NABOB questioned whether the Commission can or should attempt to define its own standards for permitting foreclosure of a broadcast license, when creditors' rights upon foreclosure are generally governed by state law and the enforcement of creditors' remedies has traditionally been handled by the courts.

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[10] Comments opposing the proposed rule were submitted by: National Association of Black Owned Broadcasters, National Association of Broadcasters, and Citizens Communications Center on behalf of Black Citizens for a Fair Media and National Association for Better Broadcasting.

[11] *See* Citizens Comments at p. 5.

Discussion

11. As we recognized in the *Notice,* there is a longstanding and firmly established principle followed by the Commission,[12] and affirmed by the United States Supreme Court,[13] that a broadcast license does not confer a property right. Rather, it is a valuable, though limited, privilege to utilize the airwaves.

12. Since a broadcast license is not subject to ownership, it has not been subject to a reversionary interest, mortgage, lien, pledge, or any other form of security interest.[14] Section 301 provides, in pertinent part, that it is the purpose of the Act "to provide for the use of [radio transmission] channels, *but not the ownership thereof,* by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions and period of the licensee [sic]. . . . " (Emphasis added). Furthermore, Section 304 of the Act requires applicants for licenses to "waive any claims to the use of any particular frequency . . . because of the previous use of the same, whether by license or otherwise." Section 309(h) requires station licenses to contain the following statement: "The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated by the license beyond the term thereof. . . ." Finally, Section 310(d) of the Act requires Commission approval prior to the transfer, assignment or disposal of rights in a construction permit or station license. While we recognize that seller financing can facilitate minority entrance into the broadcast industry, the express language of the Communications Act, and the overwhelming precedent cited herein, leads us to conclude that any automatic reversionary interest in a license is prohibited.[15] We have been cited no precedent to the contrary, and we are aware of none. Moreover, although the *Notice* sought proposals on alternative security interests

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[12] *Churchill Tabernacle v. FCC,* 160 F.2d 244 (D.C. Cir. 1947); *Radio KDAN, Inc.,* 11 F.C.C. 2d 934 (1968); *Bonanza Broadcasting Corp.,* 11 RR 2d 1072 (1967); *Yankee Network, Inc.,* 13 F.C.C. 1014 (1949); *Alabama Polytechnic Institute,* 7 F.C.C. 225 (1939); *Associated Broadcasters, Inc.,* 6 F.C.C. 387 (1938).

[13] *Ashbacker Radio Corp. v. FCC,* 326 U.S. 327, 331-332 (1945); *FCC v. Sanders Bros. Radio Station,* 309 U.S. 470, 475 (1940).

[14] In *Radio KDAN, Inc., supra* n.12, a contractual provision purporting to mortgage and create a reversionary interest in a license was declared void *ab initio.* The Commission recognized that "[t]he extraordinary notion that a station license issued by this Commission is a mortgageable chattel in the ordinary commercial sense is untenable." The Commission further noted that the sale or transfer of a bare license is prohibited. *See also Bonanza Broadcasting Corp., supra* n.12, and *Donald L. Horton,* 11 RR 2d 417, 420 (1967).

[15] As used herein, the term "automatic reversionary interest" is intended to connote an interest which passes solely by operation of law, and thus affords no opportunity for Commission review, upon the happening of some specified event such as default.

short of an automatic reverter, no specific proposals were made by the commenting parties in this regard. Thus, the record herein is insufficient to warrant authorization of any such alternative security arrangements.

13. Finally, as we recognized in the *Notice* herein, seller-creditors are not without protection. The Commission already recognizes and approves of contractual arrangements whereby fifty percent or more of the stock of a corporate licensee may be pledged, if: (1) the licensee-borrower retains the voting rights in the stock and thus control of the station, and (2) in the event of default, the pledged stock is disposed of in a manner which would not restrict the sale to the seller-creditor, *e.g.*, at public auction. Moreover, 49.9 percent of the stock (representing the absence of positive or negative control) currently may be foreclosed without prior Commission approval, although it would not be legal for such a foreclosure to result in a change of actual control. Such arrangements provide additional financial security for lenders, without jeopardizing the independence of the licensee. To the extent that potential seller-creditors can fashion analogously protective yet beneficial mechanisms, we would welcome the opportunity to consider them.

14. In conclusion, the Commission is acutely aware of the lack of financing available to capitalize minority broadcast ventures. We have already undertaken various measures to enhance minority ownership, including expansion of the use of distress sales and the availability of tax certificates. We are committed to continuing our efforts in this area. However, for the reasons noted herein, we have decided to continue to rely on the alternatives currently available to minority buyers, rather than adopting the proposals contained in the *Notice*.

15. Pursuant to Section 604 of the Regulatory Flexibility Act, 5 U.S.C. §604 *et seq.*, the Commission has prepared a Final Regulatory Flexibility Analysis in connection with this action and it is attached hereto as an Appendix.

16. Accordingly, IT IS ORDERED That, the above-captioned proceeding IS TERMINATED.

17. IT IS FURTHER ORDERED That, the Secretary SHALL CAUSE a copy of this *Report and Order* to be printed in the FCC Reports.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendix

Final Regulatory Flexibility Analysis

I. *Reason for Action.*

In order to comply with the requirements of Sections 301, 304, 309 and 310 of the Communications Act of 1934, as amended, we are retaining 47 C.F.R. §73.1150 of the Commission's Rules without modification.

II. *Summary of Issues Raised by Public Comment in Response to the Initial Regulatory Flexibility Analysis, Commission Assessment, and Change Made as a Result.*

A. *Issues Raised*

Parties supporting expansion of seller-creditors' protections argued that allowing a seller-creditor to retain a reversionary interest in a broadcast license in seller-financed transactions would lead to increased minority ownership of broadcast properties. Those opposing the change in Commission Rule §73.1150 argued that not only is the proposed modification barred by statute, but in fact, poses a substantial risk to the independent operation of minority-owned stations.

B. *Assessment*

The Commission has been persuaded by the arguments advanced by parties opposing the proposed change. While we recognize that seller-financed transactions may enable minority and other small business entrepreneurs to acquire broadcast properties, we are constrained by the Communications Act of 1934, as amended, from authorizing an automatic reversionary interest in a broadcast license. Furthermore, no alterative security arrangements short of an actual reverter were offered.

III. *Significant Alternatives Considered and Rejected.*

No other alternatives were proposed.

Comparative Renewal
Fair Break Doctrine
Programming Discrimination in
Programming Religious

Review Board affirmed *ID* grant of renewal applicant in comparative hearing after finding that licensee methodically ascertained, and responded to, community needs; regularly broadcast news and public affairs; gave "fair break" to other religions despite its own fundamentalist orientation; and thus deserved strong preference for past performance.
—*Pillar of Fire*
BC Docket No. 82-471

FCC 84R-95

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
Pillar of Fire	BC Docket No. 82-471 File No. BRH-810129VE
For Renewal of License of Station WAWZ-FM Zarephath, New Jersey	
Radio New Jersey Somerville, New Jersey	BC DOCKET No. 82-472 File No. BPH-810430AC
For Construction Permit	

Appearances

Matthew H. McCormick, Dennis F. Begley, Cheryl A. Kenny, and *William B. Rosenberg,* on behalf of Pillar of Fire; and *Eugene F. Mullin, B. Shelby Baetz,* and *Lawrence Roberts,* on behalf of Radio New Jersey.

DECISION

Adopted: December 14, 1984; Released: December 21, 1984

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, BLUMENTHAL.
BOARD MEMBER JACOBS DISSENTING WITH STATEMENT.

BOARD MEMBER BLUMENTHAL:

1. This proceeding involves the mutually exclusive applications of Pillar of Fire (Pillar) for renewal of license of Station WAWZ-FM, Zarephath, New Jersey, and Radio New Jersey (RNJ) for authority to construct a new FM broadcast station (Channel 256) at Somerville, New Jersey. By *Memorandum Opinion and Order*, 47 Fed. Reg. 35037, published August 12, 1982, these applications were designated for consolidated hearing to determine which applicant would, on a comparative basis, better serve the public interest. Although the applications specify different communities, the Commission found that "the coverage of the two stations will be essentially the same" and, therefore, concluded that "the existing record does not justify a §307(b) issue." *Id.*, at n.1. By *Memorandum Opinion and Order*, FCC 82M-3433, released November 3, 1982, presiding (now Chief) Administrative Law Judge Thomas B. Fitzpatrick (ALJ) denied RNJ's request for a "fair break" issue, but ruled that the standard comparative issue encompassed an evaluation of whether Pillar systematically excluded other religions from its overall programming during the license period. By *Memorandum Opinion and Order*, FCC 82M-3483, released November 5, 1982, the ALJ added an issue to determine whether RNJ published and distributed misleading "Fact Sheets" concerning the purported coverage area for its Station WRNJ(AM), Hackettstown, New Jersey, and the effect thereof on its comparative qualifications. In an *Initial Decision* (*I.D.*), FCC 84D-36, released May 30, 1984, the ALJ granted Pillar's renewal application after finding that: (a) the past performance of Station WAWZ-FM was substantial and Pillar, therefore, deserved a strong comparative preference for it; (b) Pillar gave a "fair break" to those who did not share its minority religious views; (c) RNJ deserved slight-to-moderate preferences under the diversification of mass media control and ownership integration comparative factors; and (d) RNJ deserved a comparative demerit for the use of misleading promotional material at Station WRNJ (AM) and a slight-to-moderate comparative demerit for its improper method of investigating Station WAWZ-FM's programming policies with respect to other religions.

2. The proceeding is now before the Review Board on exceptions and responsive pleadings filed by both applicants. We have reviewed the *I.D.* in light of the exceptions, the reply briefs, the oral argument held November 9, 1984, as well as our independent examination of the underlying record.

3. Because this is a "comparative renewal" proceeding, pitting an incumbent licensee against a challenger,[1] our primary point of reference for comparing these applicants will be the standards set forth in *Cowles Broadcasting, Inc.*, 86 FCC 2d 993 (1981), *aff'd sub nom. Central Florida Enterprises, Inc.* v. *FCC*, 683 F.2d 503 (D.C. Cir. 1982). Therein, our superiors recognized that an incumbent licensee has a statutorily-derived "renewal expectancy" if it has rendered "substantial service." *See, e.g.*, 683 F.2d at 506. This "renewal expectancy" translates into "a comparative preference weighed against [the] other [comparative] factors . . . ." *Id.*; *see also Radio Station WABZ, Inc.*, 90 FCC 2d 818 (1982), *aff'd sub nom. Victor Broadcasting, Inc.* v. *FCC*, 722 F.2d 756 (D.C. Cir. 1983). Because we have recently examined the operative comparative mechanisms at some length in *Intercontinental Radio, Inc.*, 56 RR 2d 903 (Rev. Bd. 1984),[2] we will not repeat these calisthenics here, but will liberally invoke *Intercontinental Radio* where appropriate.[3]

4. With sights fixed upon the foregoing authorities, we regard the *I.D.* Therein, the ALJ illuminated the record in an 83-page opus, comprised of 260 paragraphs of factual findings ("Fdgs.") and 22 paragraphs of "ultimate findings and conclusions" ("Concls."), all augmented by 161 detailed footnotes. In short, the Chief ALJ's *I.D.* is a model of completeness, factual accuracy and an application of the rule of law that is overwhelmingly correct. In view of the ALJ's painstaking efforts, our new review is greatly simplified, and we have no need to reproduce at public expense the great mass of data and reasoning set out pellucidly in his writing; it will neither gain nor lose by repetition. Our delegation charter, however, enjoins us to rule upon "each relevant and material exception," *see* 47 CFR §1.282(b)(2), but we need not reach "those which are not of decisional significance . . . ." *Id.* Inasmuch as we resolutely

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[1] Albeit a challenger with an AM facility (WRNJ-AM) in Hackettstown, New Jersey, *I.D.*, Fdgs. para. 206, approximately 20-30 miles from WAWZ-FM. *See id.*, paras. 6, 177, Concls., para. 16.

[2] Applications for review pending before the Commission.

[3] Except for occasional contrasting reference, the renewal and "comparative renewal" performance standards used here will not be those set forth in *Deregulation of Radio*, 84 FCC 2d 968 (1981), *aff'd in part of remanded in part sub nom. Office of Communication of the United Church of Christ* v. *FCC*, 707 F.2d 1413 (D.C. Cir. 1983) (*United Church III*). Those portions of this record relating to past performance will be judged by the requirements in effect prior to *Deregulation of Radio. See id.*, 84 FCC 2d at 1013. Pillar appears to stipulate its acquiescence by stating that "*Deregulation of Radio* . . . was adopted after the end of the license term in question and was intended to be applied prospectively." Pillar Reply at 12. Thus, for example, while the Commission has now abrogated its formal ascertainment requirements, those requirements were applicable during Pillar's license term. *See Simon Geller*, 90 FCC 2d 250, 252 n.8 (1982), *recon. denied*, 91 FCC 2d 1253 (1982), *remanded on other grounds sub nom. Committee for Community Access* v. *FCC*, 737 F.2d 74 (D.C. Cir. 1984).

affirm the ALJ's ultimate conclusion that "the record in this proceeding warrants concluding that the past performance of Station WAWZ (FM) has been substantial," *I.D.*, Concls. at para. 3, and that — factoring in the other comparative criteria — "RNJ's advantages . . . are insufficient to overcome the strong preference awarded to Pillar for its past broadcast record," *id.*, at para. 22, many of the minute exceptions raised by both parties are not "decisionally significant." Although we herein modify the *I.D.* slightly, we concur with conviction on the balance of the findings and conclusions, for reasons that we hope will clarify as we address the relevant and material exceptions below.

License Term Performance of WAWZ (FM)

5. *Licensee Ascertainment of Needs and Problems.* Anent the license term under scrutiny, "300 members of the general public were surveyed during the six-month period prior to the filing of the 1981 license renewal application." *I.D.*, Fdgs. at para. 42. Further, "[a] total of 310 community leaders in . . . ten counties were consulted during the license term," of which "117 were women, 43 Black, 26 Hispanic, 2 Oriental and one Native American." *Id.* A listing of the significant problems and needs adduced by the licensee through its ascertainment efforts is reproduced at *I.D.*, Fdgs., paras. 43-44.[4] The ALJ reports that "Pillar did not take general public interviews into consideration in preparing the [station's] problems and needs lists," conceding that the individual conducting the ascertainment "did so because Commission Rules required only that Station WAWZ-FM conduct the general public interviews, not that the station analyze them." *Id.*, at para. 46. It was further stipulated by the individual responsible for conducting the ascertainment that "Station WAWZ-FM did not plan any programs designed specifically to meet any of its ascertained needs." *Id.*, at para. 47.[5]

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[4] The listing includes the categories (predictable by virtually any adult) running the gamut from "taxes" to "drugs" and "alcohol," and from "poverty" to "divorce." It was, in part, because the formal ascertainment process reflected by Pillar's effort had become a "ritual dance" that the Commission eliminated the formal process in 1981, and now permits a more flexible approach. *Deregulation of Radio,* 84 FCC 2d at 993 *et seq.* Thus, for example, Pillar appears to seek recognition of its "ongoing ascertainment effort" through a daily call-in program and correspondence with listeners. *See* Pillar Reply at 7-8. While these efforts would certainly be cognizable under our newer policies, *see* 84 FCC 2d at 998-999, the old *regimentum* was impliable.

[5] Although this individual's statement *may* be correct in the strictest literal sense, it may also be misleading in that the licensee's deliberate and conscientious selection of programs and programming sources were either (1) selected with an eye towards covering the major problems and needs of interest to the community and service area, or (2) guaranteed to do so. Though we discuss program performance more thoroughly *infra* paras. 8-27, a review of the *I.D.*, Fdgs. paras. 80-99 will fully demonstrate our meaning.

6. In the face of the statements of Pillar's representative, RNJ accuses the licensee of a "perfunctory and cynical approach to ascertainment."[6] a description with which we do not wholly disagree.[7] Yet, in assessing the license term performance of an incumbent, we start with the core obligation that "a renewal applicant must literally 'run on his record' in demonstrating that his past programming performance has been responsive to the needs in his broadcast area." *Columbus Broadcasting Coalition* v. *FCC*, 505 F.2d 320, 326 (D.C. Cir. 1974). The operative words here — nay, the gravamen of our "public interest" standards — are *responsive performance*, and the key question, of course, is whether the licensee took steps to meet that obligation. The record objectively answers in the affirmative, for the unrebutted evidence shows that the station "posted a listing of the ascertained issues in the control room together with a public affairs log kept near the regular program log." *I.D.*, Fdgs. at para. 49. As programs were broadcast which related to the listed issues, the control operator on duty would list the ascertained issue next to the specific program broadcast. *Id.* On approximately a quarter-annual basis, the individual responsible "for seeing that Station WAWZ-FM's public affairs programs were meeting ascertained needs ... would review the public affairs logs to see if the ascertained issues were being treated .. and discussed public affairs programming with [the Station's General Manager]." *Id.*, at paras. 47, 50.

7. Based upon Pillar's deliberate and conscientious program selection, *see supra* note 5, and its maintenance of a special and separate "public affairs log" — a careful back-checking device nowhere required by the Commission[8] — as well as its consultation on a regular basis, we cannot but agree with the ALJ that Pillar made a reasonable, good faith effort to ensure that programs relating to its list of needs and interests were broadcast. *See I.D.*, Concls. para. 3.

8. *Program Performance.* As the Court of Appeals restated in *Alianza Federal de Mercedes* v. *FCC*, 539 F.2d 732, 735 (D.C. Cir. 1976): "It has been basic to the understanding of the renewal process by both

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[6] RNJ Exceptions at 7.

[7] However, as touched upon in note 4, *supra*, the Commission itself recognized in *Deregulation of Radio* that our formalized ascertainment procedures had become a "ritual dance" 84 FCC 2d at 993, and it conceded: "All of the procedural requirements that have grown up around [formalized ascertainment] may have obscured the [the basic] purpose." *Id.*, at 997.

[8] The use of contemporaneous logs to document license term performance was considered a virtual imperative by the court in reviewing *Deregulation of Radio. See United Church III, supra,* 707 F.2d at 1438-1442 (remanding elimination of program log requirements). Pillar not only maintained its FCC-required program logs, but a separate "public affairs log" as well, which log was routinely scanned by a responsible official. This in no way reflects inattention to ascertained needs and problems, nor their address.

Congress and the Commission that a licensee runs on his past record"; programming, of course, is at the heart of that record. *En Banc Programming Inquiry*, 44 FCC 2303 2311 (1960) ("programming is the essence of radio service").[9] The prismic review of programming performance customarily employed by the Commission offers a number of perspectives, some quantitative and some qualitative. All facets were duly assayed by the ALJ, and his reckoning may be found at *I.D.*, Fdgs. paras. 52-174; *see also* Concls. paras. 1-11. Not unexpectedly, RNJ takes exception to almost every feature of the ALJ's exposition,[10] and we consider these exceptions, by category, below.

9. *Quantitative Performance.* In preface, we point out that our recent *Intercontinental Radio* decision traced the disinclination of both the Commission and the courts to gauge, in any controlling degree, a station's responsiveness by a quantitative standard. We observed "that the statistical breakdown is merely one *prima facie* indicator of station performance; a quick starting point, but no more than that." *Id.*, 56 RR 2d at 919.[11] Observing, however, "that the Commission has initially consulted the quantitative breakdown of station program performance in every recent comparative renewal case," *id.*, it is appropriate to do so here, the clearest and easiest way being to employ the succinct findings of the ALJ. Thus, the *I.D.* states:

> 160. In its 1978 license renewal application Station WAWZ-FM proposed to air the following amounts of non-entertainment programming in a typical week: 360 minutes (4.76%) of news; 180 minutes (2.38%) of public affairs, and 3,900 minutes (51.58%) of all other programs exclusive of entertainment and sports. This resulted in 4,440 minutes (58.72%) of non-entertainment programming proposed by Pillar.
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> 161. During the composite week for the renewal period, Station WAWZ-FM broadcast 491 minutes (6.42%) of news, 283 minutes (3.72%) of public affairs and 4,122 minutes (53.93%) of all other programs exclusive of entertainment and sports. Non-entertainment programming broadcast during the composite week totalled 4,896 minutes (64.07%). (Pillar Ex. 10, p. 1.)

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[9] Even though certain aspects of that 1960 *Programming Inquiry* may not be valid in future cases, *see Deregulation of Radio*, 84 FCC 2d at 988-990 (licensees need not maintain "something for everyone" format suggested by *Program Inquiry*, but may specialize), responsive programming will remain the "bedrock obligation" of broadcasters, 84 FCC 2d at 982, in "comparative renewal" analyses as well, *see id.*, at 984-990.

[10] The comprehensiveness of RNJ's assault is, no doubt, a partial product of our rule which holds that "[a]ny objection not saved by exception filed pursuant to this section is waived." 47 CFR §1.277(a). Consequently, when appealing an *I.D.* and the component flock of findings and conclusions, the communications bar invariably proceeds by the spooneristic maxim: "Leave no tern unstoned."

[11] *See also id.*, at 929 n. 114 ("raw "numbers' are the beginning of the story — not the end"). Some illustrative expressions of the FCC and the court on the secondary importance of a pure quantitative analysis are set out *id.*, at 919-920.

See also id., at Fdgs. para. 54, Concls. para. 4.[12]

10. To the extent that a quantitative index has been employed by the Commission as an initial performance indicator, a two-pronged calibrator has been used: (1) the Commission's program renewal "guidelines"[13]; and (2) a "promise versus performance" tine.[14] Pillar's statistics clearly met the renewal "guidelines," and RNJ does not assert otherwise.[15] As to the second prong, the court has long held that "on a renewal application the 'campaign pledges' of applicants must be open to comparison with 'performance in office'." *Office of Communication of the United Church of Christ* v. *FCC*, 359 F.2d 994, 1005 (D.C. Cir. 1966); *see also West Coast Media, Inc.*, 79 FCC 2d 610 (1980) (license renewal denied for "promise v. performance" gap), *aff'd sub nom. West Coast Media, Inc.* v.

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[12] Pillar excepts to the fact that the ALJ's quantitative computations (reproduced above) did not later take into qualitative account that "during the composite week for the renewal period, non-entertainment programming comprised 64.07% of WAWZ-FM's air time," consisting "in large measure of religious programs, both recorded and local." Pillar Exceptions at 5. Although we devote much more discussion to the dispute over the cognizability of "religious" programs *infra*, paras. 17-20, suffice it for instant purposes to separate apples from oranges. Religious programming is clearly "non-entertainment" programming. *See Intercontinental Radio*, 56 RR 2d at 924-926 (*citing* 1960 *Programming Inquiry, supra*, 44 FCC at 2314; *Radio Station WABZ, supra*, 90 FCC 2d at 866). The more important inquiry is a *qualitative* one, to wit, whether it may be counted as what the court refers to as *"issue-responsive programming." United Church III*, 707 F.2d at 1430. As will be explained *infra*, the answer depends on whether particular programs were responsive to perceived listener needs.

[13] Given the potency of the First Amendment and 47 U.S.C. §326 (anticensorship provision), the Commission always "walk[ed] a tightrope between saying too much and saying too little." *Banzhaf* v. *FCC*, 405 F.2d 1082, 1095 (D.C. Cir. 1968). Chary of government-mandated program quotas — indeed, specifically disclaiming them, *see National Black Media Coalition* v. *FCC*, 589 F.2d 578 (D.C. Cir. 1978) — the Commission sought to remain astride its tightrope by an oblique device (otherwise known as a "skyhook"). That is, while overtly eschewing quantitative programming standards, its delegation of authority rules instructed the staff to filter broadcast station applications to detect whether an applicant proposed certain levels of prosocial programming. *See* 47 CFR §0.281(a)(8) (1980). For commercial FM stations such as our WAWZ-FM, the thresholds were: "5% total local programming; 5% informational (news plus public affairs) programming; and 10% total non-entertainment programming." *Id.*, at subsection (a)(8)(A). Though these "guidelines" were never enforced against applicants as hard and fast rules, *see Simon Geller, supra*, 90 FCC 2d at 267, the FCC's *Deregulation of Radio* eliminated them completely. *See id.*, 84 FCC 2d at 975-983.

And:

> In our view, the Commission sought, not to eliminate all considerations of quantity of nonentertainment programming, but simply to emphasize that quantity alone cannot be the measure of a licensee's responsiveness.

United Church III, 707 F.2d at 1433.

[14] *See* 47 CFR §0.281(a)(10) (1980).

[15] As will be seen *infra*, RNJ attacks the substance beneath those numbers.

FCC, 695 F.2d 617 (D.C. Cir. 1982), *cert. denied,* 104 S.Ct. 74 (1983). As reproduced above, Pillar's performance exceeded its promise, *see I.D.*, Concls. para. 4, and we affirm the ALJ's decision on this important renewal test.[16]

11. *Qualitative Performance*. RNJ's main tridential assault on the qualitative content of Pillar's programming centers on the following targets: (1) amount of local news — daily and otherwise; (2) reliance on "institutional" programming; and (3) "religious" programming. We consider these points discretely.

12. With respect to local news, RNJ submits that "[o]ther than local weather reports, WAWZ-FM broadcast a local news program on only 122 of the 1096 days of the license term"; that "WAWZ-FM had no news ticker or any other facilities for monitoring news" and had "a part-time employee who spent two or three hours a week preparing news by reviewing newspaper clippings and press releases"; and that "[f]or over three months in 1978-1979, the station had no news reporter and no local news program." RNJ Exceptions at 9. That is not to say that the station broadcast very little *total* news.

> *UPI News.* Throughout the license term Station WAWZ-FM subscribed to the audio service of United Press International. Station WAWZ-FM carried UPI World News on a regular schedule. With occasional exceptions, the newscast was broadcast between 12 and 15 times a day at the top of the hour. The newscasts were usually either four or five minutes in duration with one or two minute newscasts broadcast on occasion.

I.D., Fdgs. at para. 57 (record citations and footnote omitted). Further:

> In each of the first two years of the license term, approximately 4,500 minutes of air-time were devoted to local weather reports. During the third year, with the expansion of six daily reports from one minute to two minutes, the total air-time for weather reports increased to approximately 6,000 minutes. Whenever inclement weather forced area schools to close or alter bus and class schedules, Station WAWZ-FM

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[16] For reference purposes, and as we similarly did in *Intercontinental Radio,* 56 RR 2d at 929 n.114, the ALJ summarized his contrast of WAWZ-FM with "14 other commercial FM stations licensed to communities located in Station WAWZ-FM's 10 county service area . . . ." *I.D.*, Fdgs. at para. 169. That summary reflected:

News:	Average	8.0%
	Station WAWZ-FM	6.42%
Public Affairs:	Average	2.0%
	Station WAWZ-FM	3.72%
All Other Programs Exclusive	Average	10.5%
of Entertainment and Sports:	Station WAWZ-FM	53.93%

Id., at para. 170. Again, however, the ALJ's summary gave little count to programs partaking of a religious cast as *"issue responsive" (e.g.,* "public affairs"). *See id.*, at n.42 (two programs dealing with contemporary problems from a "religious perspective does not preclude their being classified as public affairs programs").

> broadcast the information. In addition, the station broadcast announcements of meeting cancellations and closings of government offices and the Somerset County courts due to bad weather.

Id., at para. 59 (footnote omitted). Additionally:

> The 'Regional News Review,' prepared by a member of the Station WAWZ-FM staff, provided a weekly summary of the news in Somerset and adjoining counties. The program was broadcast on most Saturday evenings during the license term. Topics regularly covered included the economy, education, employment, government, health and medical concerns, politics and taxes. The program also covered stories concerning the elderly, energy, farming, housing, pollution and transportation.

Id., at para. 61 (footnote omitted); *see also id.*, para. 62 (sampling of stories during June 1980).[17]

13. It is clear that daily local news was not, to be sure, the strong suit of WAWZ-FM, and we doubt that even its faithful listeners relied exclusively upon it for that purpose. But, even before the Commission's *Deregulation of Radio*, the Commission's generalized programming menu contained no separate category for "local news." *En Banc Programming Inquiry, supra*, 44 FCC at 2314 (14-element program service list).[18] Nor, in fact, did the Commission's application processing "guidelines" set forth in (the former) 47 CFR §0.281(a)(8)(A), *see supra* note 13. A licensee's public interest responsibility was to "discover and fulfill the tastes, needs and desires of his service area. If he has accomplished this he has met his public responsibility." *Programming Inquiry*, 44 FCC at 2312. While neither the ALJ nor we could find Pillar's local news to be "superior," we have recently held that a broadcast station's performance is assessed through review of all aspects of its "*issue responsive*" programming, "of which local newsgathering is but one facet." *Intercontinental Radio*, 56 RR 2d at 925.[19]

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[17] The ALJ also noticed the daily carriage — from September 1980 forward — of "Moral Majority Report," a 3 1/2 minute report on current events.

[18] Although the 14-element "service list" did include the broad category "news programs," the Commission stressed:

> The elements set out above are neither all-embracing nor constant. *We re-emphasize that they do not serve and have never been intended as a rigid mold or fixed formula for station operation.* The ascertainment of the needed elements of the broadcast matter to be provided by a particular licensee for the audience he is obligated to serve remains primarily the function of the licensee. His honest and prudent judgments will be accorded great weight by the Commission. *Indeed, any other course would tend to substitute the judgment of the Commission for that of the licensee.*

44 FCC at 2314 (emphasis added).

[19] It is both obvious and fortunate that no station is dispositively judged on its presentation, *vel non*, of "local news," for we note that even a station so large and prominent as WETA-TV (Channel 26), Washington, D.C., presents no daily "local news" program, as witness the TV program listings in the *Washington Post*. We may officially

14. RNJ next criticizes Pillar's reliance on what it labels "institutional" programming for responding to its listeners' needs[20]; it seems especially discomfited that the ALJ recognized and placed "great weight on the 'Rutgers University Forum' program broadcast at 6:35 *a.m.* on Saturday and 1:30 p.m. on Monday . . . ."[21] To the extent that RNJ implies that Pillar could not rely — indeed, heavily rely — on "institutional" sources to meet its public interest responsibilities, it is in plain error as a matter of law. As we just observed in *Intercontinental Radio,* where a black-formated, minority audience-targeted station relied upon the National Black Network (NBN) to bring to its listeners matters of interest to the black community, the "selection of the NBN was a voluntary program choice, no less than any other . . . ." 56 RR 2d at 923 n.70.[22] Moreover:

> The Commission has no specific requirement that any fixed percentage of a radio station's public affairs material be locally produced. While licensees are required to comply with promises made in their applications, they are also expected to exercise sound judgment in ascertaining and programming to meet local community needs. In fulfilling this latter obligation, we recognize that every local problem need not be addressed by stations and that licensees must have a great deal of discretion in establishing their program schedules. Absent a *prima facie* showing that a licensee has abused or otherwise unreasonably exercised its discretion in determining which problems or issues should be addressed or in selecting programs to address these problems or issues, no substantial and material question of fact is presented. *RadiOhio, Inc.*, 38 FCC 2d 721 (1973), *aff'd sub nom. Columbus Broadcasting Coalition* v. *FCC,* 505 F.2d 320 (D.C. Cir. 1974). The non-locally produced programs broadcast by the licensee appear to respond to a number of ascertained community needs. *Doubleday Broadcasting Co., Inc.*, 88 FCC 2d 1128, 1131 (1982); *see also United Broadcasting Co. (KBAY-FM),* 93 FCC 2d 482, 498 (1983) ("The Commission has recognized that licensees can rely on *any programming* [including 'network supplied'] which is responsive to local needs to serve its community of license") (emphasis added)[23]; *Renewals of D.C. Stations, supra* note 19, 77 FCC 2d at 906 (rejecting complaint that almost all programming of noncommercial WETA-TV

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notice, *see City of Angels Broadcasting, Inc.* v. *FCC,* No. 83-1741 (D.C. Cir. decided September 28, 1984), slip op., Dissenting Statement at 15 & nn. 47-49. Indeed, the Commission has previously considered such complaints about WETA-TV, and found them wanting. *Renewals of D.C. Broadcast Stations,* 77 FCC 2d 899, 905-906 (1980)

[20] *See, e.g.,* RNJ Exceptions at 9-23.

[21] *Id.* at 11 (emphasis in original).

[22] As a religious-oriented station, much the same might be said of WAWZ-FM's daily broadcast of "Moral Majority Report," *see I.D.,* Fdgs. para. 60. In serving the needs of its community, a licensee has been permitted to consider, as selection factors, "the particular *format* of the station [and] the *composition* of *its* audience . . . ." *Taft Broadcasting Co.,* 38 FCC 2d 770, 790 (1973) (emphasis added).

[23] *See also id.,* 93 FCC 2d at 497-498, where the Commission repeated:

> The Commission will not interfere with a licensee's discretion in determining the amount, kind, and time periods during which public affairs and other informational programming should be presented absent a clear showing that the licensee has ignored a strongly expressed problem of the community or has otherwise unreasonably exercised its discretion in the station's overall programming.

"originates with other sources" — *i.e.*, PBS). In that last-cited case, the Commission flatly reiterated that "we have never held that only locally produced material can satisfy local programming obligations." *Id.*

15. Given the foregoing principle, it appears to us that RNJ's derogation of Pillar's use of "Rutgers University Forum" — a patently superb public affairs offering, *see I.D.*, Fdgs. paras. 81-82 — is simply advocacy for advocacy's sake. As the ALJ found, the program originated "less than ten miles from the Station WAWZ-FM studios at Zarephath," *id.*, at para. 81, featured the interview of guests "regarding topics of concern to New Jersey residents" by journalists "including reporters from newspapers in Station WAWZ-FM's service area, such as *The Newark Star Ledger, The Trenton Times, The New Brunswick Home News*, and *The Courier News.*" *Id.* Rutgers is a state-supported institution; and had the "Forum" — supported by New Jersey taxpayers, including, we presume, the residents of Zarephath and Pillar's service area — been available to local radio stations and *not* carried by WAWZ-FM, we suspect that RNJ would advocate just as strongly that Pillar's neglect of the "Forum" was irrefutable evidence of its indifference to an excellent public affairs program readily available to it. As the ALJ observed, virtually everyone of its programs was relevant to a problem or need identified in Pillar's ascertainment exercise. *Compare I.D.*, Fdgs. paras. 43-44 *with id.*, para. 82. Clearly, the "Forum" could be relied upon confidently to help cover local problems and needs.[24]

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[24] At hearing, RNJ submitted exhibits which "consisted of newspaper articles relating to issues of local importance," RNJ Exceptions at 19, all apparently designed to show that Pillar violated 47 U.S.C. §315(a) ("Fairness Doctrine") in that it did not "afford reasonable opportunity for the discussion of conflicting views of public importance." *Id.*, at 17. We wholly agree with the ALJ's rejection of the exhibit for three reasons. First, as Pillar observes, in tendering its "laundry list":

> RNJ has not demonstrated that the various matters cited by it are "controversial issues of public importance,' as that term is construed by the Commission. There are many issues that are newsworthy but are not controversial or of public importance. *Healey* v. *FCC*, 460 F.2d 917, 922 (D.C. Cir. 1972).

Pillar Reply at 9. *See also Polish American Congress* v. *FCC*, 520 F.2d 1248, 1255, (7th Cir. 1975), *cert. denied.* 424 U.S. 927 (1976). Second:

> The Commission will not interfere with a licensee's determination as to which issues to cover in the absence of a clear showing that a licensee has ignored a strongly expressed problem of the community or has otherwise unreasonably exercised its wide discretion in its overall programming. *E.g., Patrick Henry,* 59 FCC 2d 1204, 1212, 37 RR 2d 1029, 1039-40 (1976), *recon. denied,* 62 FCC 2d 293, 39 RR 2d 671 (1977); *Max M. Leon, Inc.*, 56 FCC 2d 387, 391, 35 RR 2d 669, 675 (1975) *recon. denied,* 58 FCC 2d 114, 36 RR 2d 803 (1976).

Id. See generally Columbia Broadcasting System, Inc. v. *Democratic National Committee,* 412 U.S. 94, 118-121 (1973). And, third, to the extent that RNJ sought, or here seeks, to adjudicate a "Fairness Doctrine" complaint, the Commission has expressly

16. What is more, the ALJ did not rely either exclusively or too heavily on the "Forum": at I.D., Fdgs. paras. 84-97, the ALJ examined a host of other nonentertainment programs which contained material transpicuously germane to Pillar's list of ascertained needs.[25] And,

> During the license term, Station WAWZ-FM aired over 12,000 public service announcements for more than 700 local, regional, state and national organizations, including a wide array of civic, consumer, educational, health, religious and youth groups and associations. A large number of these announcements were for churches and other religious organizations in Station WAWZ-FM's service area.

Id., at para. 93 (footnote omitted). It regularly broadcast numerous radio programs intended specifically for children, *id.*, para. 97, an audience segment the Commission has urged broadcasters not to neglect. *En Banc Programming Inquiry, supra,* 44 FCC at 2314.[26] Though not locally-produced, the station regularly carried as well "UPI Roundtable," a weekly 30-minute program featuring "interviews with newsmakers, panel discussions among reporters and experts, and extended analytic news reports on significant events." *I.D.*, Fdgs. at para. 82(b). The topics and events covered are illustratively summarized at *id.*, para. 83. Other "institutional" public affairs shows, such as that produced by the University of Chicago, *see id.*, paras. 89-91, were regularly aired.

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rejected the proposal that it assess "Fairness Doctrine" compliance at renewal time rather than "reviewing complaints on an ongoing basis." In part, it said:

> . . . we do not believe it would be possible to make an 'overall' assessment of licensee performance at renewal time without considering the specifics of individual complaints. It simply would not be possible to look at the bare complaints on file and make any knowledgeable assessment of licensee performance.

Fairness Report, 48 FCC 2d 1, 18 (1974), *remanded in part on other grounds sub nom. National Citizens Committee For Broadcasting* v. *FCC,* 567 F.2d 1095 (D.C. 1977), *cert. denied,* 436 U.S. 926 (1978). Here, and *a fortiori,* there are no "complaints on file" alleging violation of the "Fairness Doctrine."

[25] We need not replicate that entire program list or the totality of topics aired; examples are "Keys To Better Living" (topics included divorce, health and recreation, reading skills, sexuality, drugs and alcohol), *see I.D.*, Fdgs. para. 84; "The Added Years" (topics relating to problems faced by senior citizens," *e.g.*, diet, diseases, financing for retirement), *id.*, para. 87; "Focus on Health," *id.*, para. 88; "Community Bulletin Board," *id.*, paras. 94-96.

[26] The *United Church III* court expressly addressed the potential effect of *Deregulation of Radio* on children's programs. *See* 707 F.2d at 1431 n.56. Though many of Pillar's children's programs had a religious ambience, that should not obscure the fact that they included many topics of great informational and cultural value to youth. *E.g.*, health, school activities, relations with parents, future careers, friendship and dating, history, literature, music, *etc. See I.D.*, Fdgs. para. 97 *passim.* As the ALJ noted correctly at n.42 of the *I.D.*, and as we discuss more deeply *infra,* paras. 17-20, the mere fact that a presentation may be bracketed within the religious genre does not disqualify it from being considered responsive public interest programming.

17. The prevailing undercurrent which tugs throughout this proceeding, and in the briefs, thrusts up the question of whether Pillar's religious programming — any or all of it — can be considered in determining whether WAWZ-FM has been responsive to the problems and needs of its community. The ALJ recognized some. *Id.*, paras. 84, 86 & nn.23, 42. Pillar excepts to the ALJ's limited recognition of its religious programming[27]:

> . . . particularly the religious programming produced by Pillar itself and ten churches within its service area. The evidence demonstrates how the programming responded to local needs and therefore supports Pillar's right to a strong renewal expectancy.

At opposite polarity is RNJ, which declares[28]:

> The Commission has granted preferences in comparative renewal proceedings based, in part, on religious programming. *See, e.g., Intercontinental Radio, Inc.*, FCC 82R-52, pp. 31-32 (Rev. Bd July 27, 1984). However, such preferences are Constitutionally impermissible. The Establishment Clause of the First Amendment declares that 'Congress shall make no law respecting an establishment of religion . . . .' The Supreme Court has interpreted the Establishment Clause to require the government to be neutral in its relations with groups of religious believers and non-believers.

In resolving this disaccord, some textural background is useful.[29]

18. Religious broadcasting has been part of the weft of radio communications since its inception (Pillar being first licensed in 1927 by the Federal Radio Commission); there are those who believe that a broadcaster should receive no credit whatever for religious programming, and those who feel otherwise. *Compare* Loevinger, *Religious Liberty and Broadcasting*, 33 Geo.Wash. L.Rev. 631, 648 (1965) (lamenting "[t]he Commission has awarded a preference to some applicants in comparative proceedings on the basis of its analysis of the content of their proposed religious programs") *with* Cox, The FCC, *The Constitution, and Religious Broadcast Programming*, 34 Geo.Wash. L.Rev. 196, 217 (1965) (not crediting religious programming "would really amount to throwing the government's weight into the scales against religion because of an overly developed concern that the application of normal public interest standards might be construed as favoring — and thereby establishing — religion"). Regardless, a religious group — like any other lawful entity — may operate a licensed radio or television station. *See Noe* v. *FCC*, 260 F.2d 739 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 924 (1959). But, like any other party, a religious entity "takes its franchise burdened by enforceable

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[27] Pillar Exceptions at 5; *see also id*, at 5-9.

[28] RNJ Reply at 3; *see also id.*, at 3-7.

[29] To be candid, we need not address these exceptions at all since it is abundantly clear from the record that — Pillar's other "religious" programming aside — its overall performance has been "substantial" within the meaning intended by the Commission and the court. *See Central Florida Enterprises, supra*, 683 F.2d at 508. But, because the law on this issue may be opaque to some and subject to recurrent controversy, we expostulate for RNJ (and company).

public obligations." *The King's Garden, Inc.* v. *FCC*, 498 F.2d 51, 60 (D.C. Cir. 1974) (*quoting Office of Communication of the United Church of Christ* v. *FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966)), *cert. denied*, 419 U.S. 996 (1974)).

19. Whereas RNJ pays grandiloquent lip service to the proposition that government must be "neutral" on the matter of religious speech,[30] we believe that it may fatally misapprehend the burden of that concept.

> Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference.

Walz v. *Tax Commission of the City of New York*, 397 U.S. 664, 676-677 (1970). Accordingly, and without favoring one religion or another, the Commission has anthropologically accepted that virtually all known human cultures — from the ancients to the present — seem to have an innate "need" for "religion," and that official recognition has been manifested uncountable times, a prominent example being its specification of "religious programs" in its *En Banc Programming Inquiry, supra*, 44 FCC at 2314.[31] Nevertheless, RNJ contends[32]:

> The mere licensing of a broadcast station to a religious organization does not involve sponsorship of religion by the Commission because religious broadcasters are subject to the same rules and regulations as broadcasters not affiliated with a religious organization and because the Commission requires such licensees to give a fair break to others who do not share their religious beliefs. *See Noe* v. *FCC*, 260 F.2d 739 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 924 (1959). However, the award of a comparative *preference* in a government licensing proceeding on the basis of religious programming (whether or not the licensee is a religious organization) carries the Commission well beyond the neutrality that was found to exist in *Noe*. It puts the Commission in the position of sponsoring religion.

20. RNJ's formulation of the operative dynamics of a "comparative renewal" expectancy is either embarrassingly confused or sophistical. No license renewal preference is awarded for religious programming *qua* "religion"; a licensee which has substantially served the needs and problems of its community is entitled to a statutorily-intended "renewal expectancy" which — *by neutral operation of law* — then translates, in a comparative context, to a preference to be weighed as against our other comparative criteria. *Central Florida Enterprises, supra*. Did any doubt remain that a licensee's religious programming could, where appropriate, be considered *"issue responsive,"* Judge Wright — orating for the court in *United Church III* — dispelled such question clearly and completely. There, responding to industry suspicion that various forms of nonenter-

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[30] RNJ Reply at 3.

[31] The court has had no perceptible problem with the Commission's historic recognition of religious programming. *See United Church III*, 707 F.2d at 1421.

[32] RNJ Reply at 4 (emphasis in original).

tainment programming, including religious programming, might not be counted toward meeting the "public interest" obligation, Judge Wright explained:

> To begin with, nothing in the [*Deregulation*] *Report and Order* indicates that the Commission will henceforth disregard the categories of programs that prompt petitioners' concerns. The Commission explicitly states that
>
> radio broadcasters [may] address issues by virtually any means. *This includes programming described under current definitions*, and can consist of, by way of example and not limitation, public affairs, public service announcements, editorials, free speech messages, community bulletin boards, and religious programming.
>
> It is clear then that a licensee may still use its programming efforts in the religious or educational areas, for example, as evidence of its responsiveness to community issues. Thus, a program featuring a panel of priests, ministers, and rabbis discussing recent statements by Catholic bishops on the morality of the nuclear arms race would certainly be considered public interest programming under either an issue or a category focus.

707 F.2d at 1430-1431 (footnote to *Deregulation of Radio* omitted).[33] RNJ might seek to transcend the *United Church III* view, but it will likely find little solacement.[34] Judge Wright's prescience is soundly validated by much of Pillar's religious programming, and — to the extent responsive to ascertained needs — should have been credited.[35]

21. Though a broadcaster with a religious orientation is as entitled to be licensed as any other party, "[a] religious sect has no constitutional right to convert a licensed communications franchise into a church." *The*

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[33] *See also Victor Broadcasting, Inc.* v. *FCC, supra* (*aff'g Radio Station WABZ, supra*, 90 FCC 2d at 866 (religious programming counted as public interest element).

[34] In *Walz* v. *Tax Commission, supra*, the High Court decreed:

> The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

397 U.S. at 669. RNJ's brand of neutrality would hardly be "benevolent," and *differential treatment* of religious programming for broadcast license renewal purposes would be unconstitutional interference of the very first magnitude. RNJ's "neutrality" would be akin to a state's hypothetical refusal to recognize parochial school diplomas, unless all state-required subjects were taught by lay instructors.

[35] Heaven knows, that while America's 10,000 broadcast stations have cumulatively devoted millions of hours to secular programming directed to the deep problems that plague our society (drugs, crime, taxes, poverty, government interference), these seem not to have abated and may have even, over the years, intensified. Pillar's sectarian methods of treating with some of these problems could surely have no lesser beneficial effect. Perhaps greater.

King's Garden, Inc. v. *FCC, supra,* 498 F.2d at 60.[36] In part, that court may have had reference to what we call the "fair break" doctrine first annunciated by the Commission in *WBNX Broadcasting Co.*, 12 FCC 2d 837, 841 (1948). That doctrine inquires as to "whether the applicant, whatever his own views, is likely to give a 'fair break' to others who do not share them." *Noe* v. *FCC, supra,* 260 F.2d at 742 (*quoting WBNX*).[37] Pillar, a pioneer broadcaster first receiving a federal broadcasting license in 1927, and the operator of WAWZ-FM since 1954, *I.D.*, Fdgs. para. 12, is doctrinally planted in "the belief in the fundamental doctrine of the orthodox Christian Protestant denominations." *Id.*, at para. 102.[38] In common parlance, Pillar's adherents are "fundamentalists." Though no "fair break" issue was designated here, RNJ sought one.[39] But, after reviewing the pertinent proffers, the ALJ concluded that "RNJ's contention that Pillar did not provide a 'fair break' to denominations with which it had fundamental differences is belied by the record evidence and rejected." *Id.*, Concls. at para. 10.

22. Having reviewed the record again, we agree, and explain best by pointing out what the "fair break" doctrine does *not* require. But first, though Pillar bespeaks of "fundamental Christianity," the record is rife with evidence that it has made its station regularly available to very different churches, including Presbyterian, Lutheran, Baptist, *etc. Id.*, Fdgs. para. 98. Pillar (AM) has carried a weekly 15-minute program produced by the Maryknoll Fathers, a controversial Catholic order whose political, economic, social and religious views could not be much further from those espoused on WAWZ-FM's "Moral Majority Report." *Id.*, para. 125. It has carried hundreds of the PSA messages of other Catholic groups as well, including the U.S. Catholic Conference, the Catholic Relief Services, the Franciscan Fathers, the Knights of Columbus, *etc. Id.* It has even carried the Mormon Choir. *Id.*, para. 128. To be sure, scores of other religions, denominations, orders, sects, movements, cults, *ad infinitum*, were not reflected in WAWZ-FM's license term record, *see id.*, paras. 129-

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[36] At the same time, *The King's Garden* court clearly stated:

> Consequently, it may well be that, after it has met its 'fairness doctrine' and 'personal attack doctrine' obligations and produced some programs of general community interest, King's Garden has the right to give a sectarian tone or perspective to all of its other programming.

498 F.2d at 60.

[37] Coincidentally, WAWZ-AM, Pillar's sister station, operates on a sharetime agreement with the selfsame WBNX. *I.D.*, Fdgs. para. 14.

[38] *See also id.*, where the ALJ reports that Pillar's governing "Discipline" adverts to "many false teachers" such as Christian Scientists and Mormons, is critical of "Popish doctrine," and believes in the "Restoration of the Jews"

[39] RNJ Exceptions at 43-47. It even engaged in several small "pranks" to demonstrate Pillar's particular theocentricity. *See I.D.*, Fdgs. paras. 107-127; *infra* para. 34.

131, and there is some rumbling over whether any rabbis appeared on the station. *See id.*, at 106 and n.59.[40] However — apart perhaps from the "personal attack" doctrine — nothing in Commission law or policy, including the "fair break" doctrine, requires a licensee to present any particular cleric, or variety of cleric, or spokesperson(s) for any and all religious inclination(s).[41] Neither need a station become an omnibus religious debating society. The "fair break" doctrine simply intends that no licensed religious group appropriate and monopolize a frequency or convert it to its private purpose by transforming that frequency into an exclusive extension of *its own church. The King's Garden, supra,* 498 F.2d at 60. *But cf. supra* note 36. This Pillar has patently not done; in both its "religious" programming and in its secular public affairs programming, the variegated views of many, many other individuals and groups have been aired, including those whose views are, no doubt, anathema to "fundamentalist Christians." No plain bigotry, such as that in evidence in *Office of Communication of the United Church of Christ* v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966) (*e.g.*, blacking-out of minority-oriented network programs and falsely claiming technical problems) is present on this record.[42]

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[40] At n.59, the ALJ reported testimony that rabbis have appeared on WAWZ-FM both before and after the instant license term. However, there is no evidence or allegation that any rabbi sought access to Pillar's station; and even if one (or more) had, Pillar was not automatically obliged to provide broadcast time. For the Supreme Court has affirmed:

> . . . in the area of discussion of public issues Congress chose to leave broad journalistic discretion with the licensee. Congress specifically dealt with — and firmly rejected — the argument that the broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public issues.

Columbia Broadcasting System, Inc. v. *Democratic National Committee*, 412 U.S. 94, 105 (1973) (*CBS* v. *DNC*). The "fair break" doctrine is not an analogue of the political "equal opportunity" stricture, *see* 47 U.S.C. §315(a). We have already dealt with Pillar's compliance, *vel non*, with the "Fairness Doctrine," *supra* para. 15 & note 24. And, if the "fair break" doctrine is to be analogized to the larger "*Fairness Doctrine*," complaints should be addressed in the identical manner, not at the end of a license term (now 7 years for radio stations) when the overall record cannot possibly be reconstructed or perfectly recalled. *Cf.* RNJ Exceptions at 24-27 (non-contemporaneous programming evidence not as reliable).

[41] Nor does the Communications Act require that a licensee's microphone be transmogrified into a modulating airport lounge, hosting at government *pronunciamento* all comers from the Druids to the disciples of Bhagwan Shree Rajneesh. Broadcasters are not "common carriers," 47 U.S.C. §153(h); apart from 47 U.S.C. §312(a) ("reasonable access" for federal candidates) and 47 U.S.C. §315(a) ("equal opportunity" for political candidates), no organization or individual has a right of access to a frequency, *CBS* v. *DNC, supra,* note 40, 412 U.S. at 111-114; a broadcaster's programming decisions are not "state action," *Kuczo* v. *Western Connecticut Broadcasting Co.*, 566 F.2d 384 (2d Cir. 1977); and even a state-supported public broadcaster's facilities are not a "public forum." *Muir* v. *Alabama Ed. Television Comm'n*, 688 F.2d 1033 (5th Cir. 1982) (*en banc*). The cardinal FCC policy remains, as always:

> Licensees are faced with many conflicting and competing needs of the various elements found within their service areas. How they respond to those needs is a matter left largely to their discretion.

See, e.q., Storer Broadcasting Co., 41 FCC 2d 792, 812 (1973). In the matter of religious issues, *see Madalyn Murray*, 5 RR 2d 263 (1965).

23. While we have completed discussion of the main triad of RNJ's programming performance exceptions, several other points have been raised which bear attention. RNJ asserts[43]:

> The findings of the Presiding Judge in this renewal proceeding document that WAWZ-FM severely limited the number of political broadcasts it carried. The record also demonstrates that these limitations were the result of a deliberate policy.

Those findings were:

> Station WAWZ-FM produced no programs devoting coverage to local elections during the license period, although Somerset County and its political subdivisions had elections during the license term. The station did not broadcast information concerning Somerset County ballot questions during the license period.

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[42] Curiously, in a recent article headlined *Religious Bigotry of the 80's*, American Enterprise Institute resident scholar and Catholic theologian Michael Novak opined:

> Thus, bigotry against evangelicals has remained the last permissible bigotry. Anti-black, anti-semitic, anti-Catholic, anti-woman, anti-handicapped, and other major forms of bigotry are easily spotted and publicly denounced. But even 'the best people' feel free to express bigotry against evangelicals.

Mr. Novak further observed:

> The rural style of Evangelical Protestantism is not the religious style which Catholics, Jews, or even Northern-city Protestants are accustomed. Its rhythms, metaphors, enthusiasms, and fears are on a wavelength different from ours.
>
> Somehow, we manage to accept evangelical Protestantism among blacks better than among whites.

Washington Times, November 9, 1984, at 1D, col. 1. He went on to conclude:

> It is much better for this nation to have a 'Moral Majority' than a 'silent majority' — better for two reasons.
>
> First, by breaking their silence, *the evangelicals have learned that they are not a majority*, but only a *significant minority*. They also have learned that other Americans do not spontaneously admire their morality. This has surprised some.
>
> Second, by entering the national debate, they have been obliged to rethink their positions, develop larger sensitivities, expand their horizons, learn new forms of cooperation and civil argument. Entering the national dialogue has been good for them — and for the rest of us.

Id. (emphasis added).

[43] RNJ Exceptions at 16; *see also id.*, at 13-15.

I.D., Fdgs. at para. 165 (record citations omitted). After reviewing the various political and election matters that were, in fact, covered, the ALJ concluded:

> Although the political coverage provided by Station WAWZ(FM) was minimal in scope, it does not warrant a conclusion that Pillar did not exercise 'reasonable good faith judgment' in the exercise of its licensee discretion under the particular facts present. *New Primer on Political Broadcasting and Cablecasting*, 69 FCC 2d 2209, 2222 (1978).

Id., Concls. at para. 8.

24. The ALJ's conclusion is fair and accurate: even Pillar concedes that "coverage of political matters may not have been as extensive as that provided by other stations in the area . . . ."[44] Yet, as we have interpreted regnant policy and law:

> An analysis of a licensee's relative responses to the important needs and tastes of its service area should focus on the licensee's *overall program service* rather than on *isolated aspects of programming* such as the source of certain programs or the program format used to treat such needs and tastes.

Broadcast Communications, Inc. (WOJO-FM), 93 FCC 2d 1162, 1168 (Rev. Bd. 1983) (emphasis added), *review denied*, 55 RR 2d 997 (1984) (*citing WPIX, Inc.*, 68 FCC 2d 381, 400 (1978)), *appeal pending sub nom. Genesis Broadcasting, Lt'd.* v. *FCC*, No. 84-1154 (D.C. Cir. 1984).

25. On the other hand, Pillar asserts that its policy of not selling, *inter alia*, political commercials should have been favorably considered.[45] Although WAWZ-FM occupies a "commercial" frequency, it has maintained a noncommercial policy. *See, e.g., I.D.*, Fdgs. para. 76. Thus, the station sold no advertising time, even to political candidates. *See id.*, at paras. 76-79. Conversely, RNJ implies that this practice conflicts with Commission policy. *See* RNJ Exceptions at 15; *see also* RNJ Reply at 10: "Pillar makes no showing that its commercial-free policy resulted in better programming for its listeners . . . . Had WAWZ-FM aired commercials, it is entirely possible that its public service performance would have improved." But for 47 U.S.C. §312(a)("reasonable access" time to federal candidates) and 47 U.S.C. §315 ("equal opportunity" for opposing candidates), a non-commercial licensee need not sell time to political candidates. *Use of Broadcast Facilities by Candidates for Public Office*, 34 FCC 2d 510, 537-538 (1972); *see generally*, *CBS, Inc.* v. *DNC*, 412 U.S. 94 (1973).[46] Nonetheless, RNJ contends[47]:

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[44] Pillar Reply at 7.

[45] Pillar Exceptions at 9-10.

[46] The record does not reflect any complaint that a federal candidate was refused "reasonable access" on WAWZ-FM.

[47] RNJ Reply at 11 (footnote omitted). Though RNJ here relies on *Deregulation of Radio*, it is elsewhere obvious that it seeks the application of the performance standards applicable prior thereto. *See* RNJ Exceptions *passim*.

Pillar's commercial-free policy served only to reinforce WAWZ-FM's isolation from its community and the marketplace forces on which the Commission has increasingly come to depend to ensure that commercial radio stations deliver programming in the public interest. *See, e.g., Deregulation of Radio,* 84 FCC 2d 968 (FCC 1981), *aff'd in part and remanded sub nom. Office of Communication of the United Church of Christ* v. *FCC,* 707 F.2d 1413 (D.C. Cir. 1983).

Pillar will be neither favored nor disfavored for its noncommerical policy, there being no authority to support either its theorem or that of RNJ.

26. Although the Commission must assess a renewal applicant's record,[48] our *Intercontinental Radio* decision found that the agency and the court have placed emphasis on the response of the licensee's consumers, its audience. *See id.,* 56 RR 2d at 921. *Inter alia,* we there cited (then) Judge Burger's invocation of *"our national tradition that public response is the most reliable test of ideas and performance in broadcasting as in most areas of life." Office of Communication of the United Church of Christ* v. *FCC, supra,* 359 F.2d at 1003 (emphasis added); *see also Central Florida Enterprises, supra,* 683 F.2d at 508; *Victor Broadcasting, supra,* 722 F.2d at 762. Pillar correctly asserts: "Thirty-one members of the general public testified in support of WAWZ-FM. Of that number, seven were elected public officials."[49] The ALJ summarized the testimony at *I.D.,* Fdgs. paras. 139-159; "[m]any cited the various public affairs programs as their reason for concluding that Station WAWZ (FM) was an effective local outlet addressing contemporary problems." *Id.,* Concls. at para. 11. RNJ rejoins that the ALJ placed too much weight on that testimony,[50] complaining particularly that there was "no showing that these witnesses represented a cross-section of public opinion concerning the operation of WAWZ-FM."[51] But, Pillar also received 1593 letters during the license term, a sampling of which was also admitted. *I.D.,* Fdgs. para. 133. Listeners, many elderly, "expressed enthusiasm" and "appreciation" for Pillar's programming. *Id.,* at paras. 134-135. RNJ responds: "The Presiding Judge's opinion made no mention of any public witnesses who opposed the renewal of the station's

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[48] *But cf. Black Citizens For A Fair Media* v. *FCC,* 719 F.2d 407, 416 (D.C. Cir. 1983) (aff'g FCC's "presumption of service in the public interest" in favor of renewal applicants), *cert. denied,* 104 S.Ct. 3545 (1984).

[49] Pillar Exceptions at 10. Eschewing "cumulative" evidence, the ALJ limited Pillar to "no more than 40 public witnesses." *I.D.,* Fdgs. at n. 78. Nonetheless, the licensee "proffered 86 other affidavits of community leaders and members of the general public which supported Station WAWZ-FM." *Id.*

[50] *See* RNJ Exceptions at 25-27.

[51] *Id.,* at 26 (*citing Simon Geller, supra,* 90 FCC 2d at 266 n.76). *But see I.D.,* Concls., n.144. To a certain extent, however, the ALJ's witness limitation may be a relevant factor, *see supra* note 49 and Pillar Exceptions at 12.

license."[52]

27. We have reexamined the record underlying the exceptions and are in accord with *I.D.*, Concls. paras. 11-12. Though there may have been some complaints (including a certain one filed in direct collusion with RNJ, *see id*, Fdgs. paras. 136-138) — no licensee is perfect or immune from criticism[53] — the testimony and the letters here overwhelmingly affirm that WAWZ-FM was addressing the problems and interests of its community and the primary service area in a manner that was both meaningful and helpful. We are constrained to join the synopsis of Pillar[54]:

> In sum, while the testimony of public officials regarding WAWZ-FM's past broadcast record is of importance, the statements of the other public witnesses appearing on Pillar's behalf must not be ignored. The testimony of those witnesses clearly indicates that WAWZ-FM enjoyed an excellent reputation for service to the community. Such a reputation is noteworthy in evaluating WAWZ-FM's past broadcast record. *E.g., WABZ, supra,* 90 FCC 2d at 841-42.

Standard Comparative Issue

28. *Diversification of Mass Media Control.* Pillar is also the licensee of Station WAWZ(AM), Zarephath, and has attributable interests in an AM broadcast station in Denver, Colorado and an FM station in Cincinnati, Ohio.[55] *I.D.*, Concls. paras. 14-15. RNJ is the licensee of daytime-only Station WRNJ(AM), Hackettstown, New Jersey, which is located approximately 20-25 miles from its proposed community of license, Somerville. *Id.*, at para. 16. Because Pillar's Station WAWZ (AM) operates

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[52] RNJ Exceptions at 26-27. Paradoxically, neither do any of RNJ's pleadings (save the cited language).

[53] Just for example, the U.S. Central Intelligence Agency currently appears quite peeved at ABC. *See Broadcasting*, December 3, 1984, at 38 ("CIA Asks FCC To Put Licenses of ABC O&O's at Jeopardy"). Claiming a "Fairness Doctrine" violation, the CIA has, *in haec verba*, suggested that:

> . . . an appropriate action that the commission can take is to frame ABC's misconduct as an issue to be considered in determining whether its stations have the character qualifications to entitle them to license renewals. This action is necessary because of the seriousness and extent of ABC's betrayal of the public interest.

Id. Given the subject nature of that controversy, we can but assume that ABC is relieved that the CIA is first exhausting its administrative remedies.

[54] Pillar Exceptions at 14.

[55] Pillar also publishes two religious magazines, including a 16-page bimonthly periodical, in Zarephath. It also publishes books and other material written by its clergy. *I.D.*, Fdgs. para. 19. The magazines are circulated nationally to subscribers, who are "modest" in number, perhaps 15,000. Tr. 136-38. We find that Pillar's publishing interests are a very minor matter having only minimal impact on the diversification comparison in this case. *Compare Minority Broadcasters of East St. Louis, Inc.*, 56 RR 2d 275, 282-283 (Rev. Bd. 1984) *with Daytona Broadcasting Co., Inc.*, 55 RR 2d 1326, 1335 (Rev. Bd. 1984).

only 31 hours per week,[56] the ALJ gave diminished diversification weight to that station and awarded RNJ a "slight-to-moderate" diversification preference. *Id.*, at para. 17. In its exceptions, RNJ claims entitlement to a substantial preference; Pillar cedes it no preference at all. *Compare* RNJ Exceptions at 31-32; Reply at 14-16 *with* Pillar Exceptions at 18-21; Reply at 16-17.

29. We affirm the ALJ's balancing of the applicants' respective media interests and his award of a slight-to-moderate preference to RNJ. As we have often stated, "under the diversification criterion, media holdings in the proposed community of license are normally of most significance, followed by holdings in the remainder of the proposed service area, and then on the regional and national level." *Scott and Davis Enterprises, Inc.*, 88 FCC 2d 1090, 1094 (Rev. Bd. 1982) (*citing Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394-395 (1965)). In applying this comparative template, where an applicant already has another station in the proposed community and a competitor owns no interests in the community, service area, or region, a substantial diversification preference is uniformly awarded to the competitor. *E.g., Thomas C. and Essie L. Collins*, 93 FCC 2d 467, 469 (Rev. Bd. 1983); *Nunance Corp.*, 85 FCC 2d 412, 420 (Rev. Bd. 1981), *review denied*, FCC 81-473, released October 1, 1981. Here, however, the competitor, RNJ, owns AM Station WRNJ which not only lies within the region, but — more significantly — serves much of the proposed service area.[57] In *CJL Broadcasting, Inc.*, 95 FCC 2d 544 (1983), the Commission awarded a moderate preference where the losing applicant owned a fulltime station in the community of license and had ownership interests in two distant stations while the winner had a daytime-only station in the adjoining community. Considering only *ownership* interests, the facts here are sufficiently analogous as to warrant a similar RNJ preference. But, as the ALJ rightly noted, Pillar's Station WAWZ (AM) broadcasts only 31 hours per week and, thus, the reach of its "voice" is obviously less than that of a fulltime, or even daytime-only, station. This fact further diminishes slightly RNJ's edge. *Cf. Lynn Mountain Broadcasting*, 9 FCC 2d 854, 855 (Rev. Bd. 1967) (applicant holding controlling interest in daytime-only station in community entitled to "a clear, albeit slight, preference" over applicant owning unlimited-time station in same community). Hence, we affirm the ALJ's conclusion that a "slight-to-moderate" preference satisfactorily expresses RNJ's net diversification advantage over Pillar.

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[56] Station WAWZ (AM) operates only 31 hours per week because it has a sharetime agreement with Station WBNX, New York, New York. *I.D.*, Concls. para. 14.

[57] Somerville is located just within the 0.5 mV/m signal contour of Station WRNJ (AM). *I.D.*, Concls. para. 16.

30. *Integration of Ownership and Management.* Pillar was credited with 14.3% parttime integration, which corresponds to Dr. E. Jerry Lawrence's commitment of 20 hours a week to supervising the financial and legal aspects of station operation, and to participate in station programming. *I.D.*, Concls. para. 19. RNJ was credited for 33⅓% fulltime plus 33⅓% parttime integration because Norman Worth (a ⅓ owner) will serve fulltime as General Manager of the station and Lawrence J. Tighe, Jr. (another ⅓ owner) will devote a minimum of 20 hours per week as Chief Engineer of the station. *Id.*, para. 18. The ALJ awarded RNJ a "slight-to-moderate" integration preference based on the above credits. *Id.*, para. 20. We agree with RNJ in that its preference should be upgraded to a "moderate" one based on its 33⅓% vs. 0% advantage in fulltime integration. *See Nuance Corp.*, *supra*, 85 FCC 2d at 419 (moderate preference based on 26.6% to 0% edge in fulltime credit).[58]

31. *Past Broadcast Record.* RNJ excepts to the ALJ's rejection of its Exhibits 40 and 42 which purportedly contain a "statistically valid research showing that of a random sample of Somerville, New Jersey, residents none selected WAWZ-FM as the radio station in the area most responsive to community needs, and that WAWZ-FM's listenership in 1981 was so miniscule as to not even register as statistically significant for Arbitron's Somerset County ratings survey." RNJ Exceptions at 27. Pillar responds that the ALJ excluded the proffered material as being irrelevant, citing Tr. 662-663, 1386-1387, 1391. Pillar Reply at 13. Further, Pillar states: "The popularity of a radio station in and of itself is not a valid basis for grant or denial of a renewal expectancy." *Id.* We affirm the ALJ's exclusion of these exhibits. WAWZ-FM operates as a noncommercial station, *I.D.*, Fdgs. para. 18 & n.9,[59] and noncommercial stations (especially the excellent members of the Public Broadcasting System) are notorious for their barely measurable audience ratings in contrast to commercial stations. *Cf. San Joaquin TV Improvement Corp.*, 96 FCC 2d 617, 621 (Rev. Bd. 1984) (application for review pending). This is especially so where, as here, a plethora of mass-targeted commercial stations serve the geographic area in question. Thus, RNJ Exhibits 40 and 42 (even if casually admitted into evidence) would permit no valid inference to be drawn as to whether WAWZ-FM presently serves well — or fails to serve at all — the public interest. While some unreconstructed economic Darwinists might support RNJ's postulate, we agree with Pillar that its

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[58] Pillar excepts to the ALJ's recognition of integration credit for Tighe because his role is allegedly consultative and non-managerial. We disagree. In any event, this exception is non-decisional because of the *Policy Statement's* dominant emphasis on *fulltime* ownership participation in management. *See* 1 FCC 2d at 395.

[59] As mentioned *supra* para. 25, although WAWZ-FM broadcasts on a "commerical" frequency, it does so on a not-for-profit basis, selling no commercial products or sport announcements.

station's ratings popularity is not a proper measure of whether it may be renewed. Minority audiences are, in fact, one vital reason why the Commission strives ever to multiply program sources and to achieve a diversity of station ownership.

32. RNJ excepts to the ALJ's ruling which denied a request contained in its "threshold showing," submitted November 17, 1982, to explore the alleged "unusually good past programming performance and broadcast record" of its Station WRNJ(AM), Hackettstown, New Jersey. *See Memorandum Opinion and Order*, FCC 83M-42, released January 6, 1983. It claims that the comparison of "composite week" figures in the 1981 renewal applications of WRNJ(AM) with those of twelve other stations licensed within a 25-mile radius of Hackettstown showed WRNJ(AM) to be ranked third in percentage of news (combined with public affairs) and third in percentage of public affairs alone. RNJ avers that its percentages in these categories were above the averages, 14.09% and 3.1%, respectively.[60] It also contended that its "news and public affairs programming evidenced a special sensitivity to the area's changing needs," especially its "informational programming consist [ing] of flexible locally produced programs designed to meet those needs."[61] Pillar retorts that the ALJ properly found that RNJ "failed to demonstrate unusual attention to the public's needs ... [or] 'special sensitivity' to the changing needs of the area"and that the ALJ properly "took particular note of RNJ's failure to meet 100% of its nonentertainment programming promises."[62]

33. We affirm the ALJ. RNJ's Exhibit 11 of its "threshold showing" reveals that, in the "composite week" for its 1981 renewal application, WRNJ(AM) broadcast 10.3% news, 5.6% public affairs, and 1.9% "other" nonentertainment for a total of 17.8% nonentertainment programming, and 113 public service announcements. It had "promised" to program 11% news, 2.2% public affairs, 3.7% "other" — totaling 16.9% total nonentertainment programming — and 175 PSAs. Thus, RNJ's composite week performance failed even to meet its promise in three of five categories. Furthermore, in comparison with the other twelve stations for which it proffered "composite week" data, its news programming percentage was in eighth place; public affairs, third place; "other" nonentertainment, tenth place; total nonentertainment, sixth place; and PSAs, tenth place. Upon reviewing this indicia — wherein we find that WRNJ (AM)'s past broadcast record is certainly in the upper-average realm — we agree that RNJ, nevertheless, has failed to meet the more formidable test of

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[60] *See* RNJ Exceptions at 29-30.

[61] *Id.*, at 30.

[62] Pillar Reply at 14.

establishing that its programming was "unusually good." *See Minneapolis Star and Tribune Co.*, 88 FCC 2d 1604, 1612-14 (Rev. Bd. 1982).

34. RNJ also excepts to the ALJ's assessment of a slight-to-moderate comparative demerit for the efforts of David Field and RNJ principal, Lawrence J. Tighe, Jr., to "test" Pillar's programming policies with respect to other religions.[63] This matter is thouroughly discussed in the *I.D.*, Fdgs. paras. 107-124, Concls. n.142. We erase the demerit because we agree with RNJ that the use of "testers" is not an improper method for investigating suspected unfair discrimination practices. *Cf. Haven Realty Corp.* v. *Coleman*, 455 U.S. 363 (1982) (use of "testers" to document alleged Fair Housing Act violations). On the other hand, the "tests" showed merely that the licensee rejected particular programs, a proper act of licensee discretion. *See supra* paras. 21-22; *see also CBS* v. *DNC*, *supra*, 412 U.S. at 118-119; *Storer Broadcasting, supra*, 41 FCC 2d at 812. Its rejection of the World Jewish Broadcasting Network's "Music Magazine," *see I.D.*, Fdgs. paras. 107-115, proves nothing; it is clear that RNJ *itself* does not air that program or, apparently, anything from that program source. *Id.*, para. 109. In fact, while Field told that Jewish network that WRNJ(AM) was interested in "Music Magazine," it was not interested in the slightest. *id.* We here recall the caveat of Justice Douglas:

> The music selected by one bureaucrat may be as offensive to some as it is soothing to others. The news commentator chosen to report on the events of the day may give overtones to the news that pleases the bureau head but which rile the ... audience. The political philosophy which one radio speaker exudes may be thought by the official who makes up the ... programs to be the best for the welfare of the people. But the man who listens to it ... may think it marks the destruction of the Republic... . Today it is a business enterprise working out a radio program under the auspices of government. Tomorrow it may be a dominant political or religious group. ... Once a man is forced to submit to one type of radio program, he can be forced to submit to another. It may be but a short step from a cultural program to a political program ... . The strength of our system is in the dignity, the resourcefulness, and the independence of our people. Our confidence is in their ability as individuals to make the wisest choice. That system cannot flourish if regimentation takes hold.

Public Utilities Commission v. *Pollak*, 343 U.S. 451, 468 (1952) (Dissent).

35. Finally, RNJ excepts to the ALJ's assessment of a comparative demerit against it because certain of its promotional materials for Station WRNJ(AM) were found to be misleading, inaccurate, and deceptive.[64] The ALJ's findings are extensive and we agree with his conclusion that a comparative demerit lies against RNJ. *See I.D.*, Fdgs. paras. 206-60, Concls. para. 21 and nn. 157, 158. In affirming the ALJ, we disagree with RNJ's proposition that the Commission's recent withdrawal from regula-

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[63] RNJ Exceptions at 41-43.

[64] *Id.*, at 32-41.

tory oversight of inaccurate coverage claims, *Elimination of Unnecessary Broadcast Regulations*, 94 FCC 2d 619 (1983), effectively moots the issue here and expunges its demerit.[65] The Commission's foregoing policy statement is prospective in nature. *Id.*, at 623; *Colorado Television, Inc.*, 56 RR 2d 1080, 1085 (Rev. Bd. 1984); *supra* note 3. In predicting a licensee's future conduct, the critical question is whether a licensee followed policies in effect at the time of its actions; it is largely irrelevant that they were subsequently changed. *See id.* We must, therefore, determine whether RNJ complied with applicable policies in force *at that time*. As in *Colorado Television*, the record fails to show that RNJ's delicts were made "knowingly," but they do reflect indifference, and we accordingly affirm the ALJ's assessment of a comparative demerit as the proper sanction here. However, in view of our conclusions herein regarding the efficacy of Pillar's "renewal expectancy," the demerit here affirmed does not affect the ultimate comparative result in any decisional sense.

Conclusion

36. Reviewing the bidding, the record here reflects that, in operating WAWZ-FM during the subject license term, Pillar:

- methodically ascertained the problems and needs of its community and service area, interviewing both community leaders and members of the general public in sufficient numbers to appreciate their concerns;
- regularly monitored its programming to determine whether programming responsive to those needs was being aired;
- incurred no quantitative "promise v. performance" gap;
- regularly broadcast news and public affairs programming;
- despite its "fundamentalist" religious orientation, did not transgress the Commission's "fair break" doctrine; and
- violated no other FCC rule or policy over the entire license period.

The evidence carefully sifted by the ALJ demonstrates that Pillar's public interest performance level is in glaring contradistinction to that described, in effect, as minimal by the Commission in *Simon Geller, supra*, 90 FCC 2d at 267. There:

> Geller broadcast *no* news, *no* editorials, and *none* of his programming was locally produced. *None* of his programs, moreover, were presented in response to ascertained community needs and problems.

Id., at 265 (emphasis added). As an overview, perhaps Pillar itself says it rather reasonably[66]:

> While Pillar may not have operated the type of station that RNJ would have operated, the extensive record in this proceeding demonstrates beyond doubt that

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[65] *Id.*, at 33-34.

[66] Pillar Reply at 3-4.

> Pillar responsibly exercised the discretion entrusted to it as a licensee, responded to community needs and added to the diversity of voices available to the listening public through radio. RNJ appears to argue that unless the licensee's programming falls into the narrow categories of 'local news' and 'local public affairs,' it is not worthwhile and responsive to the public. The Commission, to the contrary, long has recognized that licensees may rely on any type of programming to respond to the needs of their audiences. Where the Board has concluded that an incumbent licensee should not prevail over a "comparative renewal" challenger under the mechanics set forth in *Central Florida Enterprises, supra*, it has favored the challenger. *See United Broadcasting Co., Inc.*, 94 FCC 2d 938 (Rev. Bd. 1983) (application for review pending); *George E. Cameron, Jr. Communications*, 91 FCC 2d 870 (Rev. Bd. 1982), *recon. denied*, 93 FCC 2d 789 (1983).[67] In the case at bar, we find that the ALJ is amply supported by the showings in his determination that: "The record evidence warrants characterizing such service as 'sound, favorable, and substantial' and concluding that Pillar, as the licensee of Station WAWZ(FM), merits a strong preference for its past performance." *I.D.*, Concls. at para. 12 (footnotes omitted).

37. There are those who might review this same record and afford more weight to some of the local religious programming synthesized by the ALJ, consider Pillar's responsiveness to its perception of local needs and its sincerely held belief as to the optimum way of treating with the problems, and find the overall performance of WAWZ-FM to be "superior." But this is, we know, a sensitive constitutional area, *see supra* paras. 17-20, and not without subjective differences in cosomology. But our jurisdictional universe embraces over 10,000 broadcast voices (as well as several other electronic program sources), and surely there is room within that cosmos for a minority voice such as Pillar's.[68] That its idiosyncratic timbre may not be shaped by a federal *or* commercial marketplace cookie-cutter only substantiates our oft-stated allegience to the idealized concept of diversity. *See Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969). Pillar has not monopolized its frequency, giving regularized vent to sub-voices as varied as Rutgers University, the University of Chicago, the Moral Majority, U P I, the Presbyterians, the Lutherans, the Baptists, the ACLU, Governor Brendon Byrne, Senator Harrison Williams, Judge Sirica, G. Gordon Liddy, the U.S. Secretaries of Education, Transporta-

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[67] Thus, RNJ needlessly reminds us that:

> For years the Court of Appeals 'has urged the FCC to put some bite into its comparative [renewal] hearings.' *Committee for Community Access* v. *FCC*, D.C. Cir. No. 82-2314, June 15, 1984, slip op., p. 2.

RNJ Exceptions at 4. But we do not read the court's dictum as exhorting the Commission to act the rabid hound — a *ferae bestiae* devoid of balance or restraint. *Compare City of Angels Broadcasting, Inc.* v. *FCC, supra*, Dissenting Statement, slip op. at 2 ("our desire to put [comparative renewal licensee] out of the broadcasting business") *with id.*, Opinion, at 24 n.14 ("not our mission to seek to put [licensee] . . . out of the broadcasting business").

[68] *See United Church III*, 707 F. 2d at 1434-1435.

tion, Health and Human Services, and so on and so on.[69] It has earned a renewal expectancy.

38. Insofar as RNJ, which would cast its competitor into a "pillar of salt," we find that it offers little more in terms of local diversification, or fulltime integration of ownership (far less than a majority of RNJ's ownership), or other comparative advantage. We appreciate its frustration at WRNJ(AM)'s confinement to daytime-only broadcasting, and we easily understand why it would covet a nearby FM facility (all FM facilities being fulltime). The Commission has recently taken substantive steps to alleviate the chronic angst of daytime broadcasters, *see Hours of Operation of Daytime-Only AM Broadcast Stations,* 49 Fed. Reg. 17942, April 26, 1984, *proceeding terminated,* FCC 84-591, released December 4, 1984, and is, additionally, actively endeavoring to increase the availability of FM broadcast frequencies. *FM Broadcast Station Assignments,* 94 FCC 2d 152 (1983), *reconsideration,* 55 RR 2d 903 (1984). But nothing in this instant record would permit us to frustrate Pillar's earned "renewal expectancy" by substituting RNJ on WAWZ-FM's radio channel, an FM channel it has occupied for 30 years with an uninterrupted triennial affirmation by the Commission that it has served the "public interest, convenience [and] necessity." 47 U.S.C. §307(d)(1981).

39. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend filed July 11 and September 5 and 14, 1984 by Pillar of Fire ARE GRANTED, and the amendments ARE ACCEPTED; and

40. IT IS FURTHER ORDERED, That the motion to correct transcript filed November 30, 1984 by Radio New Jersey IS GRANTED; and

41. IT IS FURTHER ORDERED, That the application of Pillar of Fire (File No. BRH-810129VE) for renewal of license for Station WAWZ-FM, Zarephath, New Jersey IS GRANTED, and the application of Radio New Jersey (File No. BPH-810430AC) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

Dissenting Statement of Board Member
Jerold L. Jacobs

Pioneers have been known to go astray in the wilderness. *See Gross Telecasting, Inc.*, 92 FCC 2d 204, 52 RR 2d 851 (Rev. Bd. 1982), *rev.*

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[69] A number of those sub-voices embraced the widely divergent views of eminent representatives of the local and general print media as well. *See I.D.*, Fdgs. paras. 81(a), 82(b)-83, 92. It is also impossible that Pillar's regular broadcasts of U P I News, UPI "Roundtable," or Rutgers' "Forum" over the entire license term did not report the views of prominent national (and international) religious leaders on controversial issues of public importance.

denied, FCC 83-443, released November 21, 1983 (Comm'n) (48-year licensee given short-term renewal for various nonegregious wrongdoing in non-comparative case); *United Broadcasting Co., Inc.,* 94 FCC 2d 938 (Rev. Bd. 1983) (32-year licensee fails to obtain renewal expectancy because of inadequately proved past performance, serious past misconduct, and concerns about future reliability; grant goes to competing new applicant). In the instant case, the presiding Chief Administrative Law Judge and the Review Board majority have both concluded that 57-year licensee Pillar of Fire's past performance during 1978-81 at Station WAWZ (FM), Zarephath, New Jersey,[1] was sufficiently "substantial" to warrant a renewal expectancy, thereby overcoming Radio New Jersey's otherwise comparative edge. In so doing, they give short shrift to a matter of decisive significance which, I believe, vitiates Pillar's renewal expectancy and therefore requires the grant of RNJ's application. Undazzled by Pillar's fire, I respectfully dissent.

The pluralistic nature of American society is echoed by the command of the Communications Act of 1934, as amended, that this agency may only grant licenses where "the *public* interest, convenience, and necessity will be served" (emphasis supplied). 47 U.S.C. 309(a). Licensees have no ownership right in their licenses or in the radio frequencies they use. 47 U.S.C. 301, 304. It is a public purpose they are serving, not a private one, and our licensees are public trustees with a duty to serve the needs and interests of the *entire* community.

Thus, while mindful of the Act's injunction against Commission censorship of radio communications or interference with the right of free speech, 47 U.S.C 326, the Commission and the Review Board have always been properly, albeit gingerly, concerned that a station license not be converted into a mere extension (via antenna) of the licensee's personal affairs or business. A religious group, like any other, may buy and operate a licensed radio or television station. *See Noe* v. *FCC,* 260 F. 2d 739 (D.C. Cir. 1958), *cert. denied,* 359 U.S. 924 (1959). But, like any other group, a religious sect takes its franchise "burdened by enforceable public obligations." *Office of Communications of United Church of Christ* v. *FCC,* 359 F. 2d 994, 1003 (D.C. Cir. 1966).

The decisive "public obligation" at issue in the Pillar renewal is the so-called "fair break" doctrine. Simply stated this Commission precept holds that a potentially disqualifying cloud is cast over the public trustee/public interest credentials of a broadcast licensee or new applicant whose past broadcast record or future operations proposal raises the question "whether the applicant, whatever his own views, is likely to give a 'fair break' to others who do not share them." *WBNX Broadcasting Co., Inc.,*

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[1] The first Pillar broadcast facility was authorized in 1927. However, Pillar began operation of WAWZ(FM) in 1954.

12 FCC 837, 841 (1948). The resulting character inquiry focuses not on the opinions and beliefs of the applicant but rather on its acts of commission or omission. *Id.* The doctrine has been judicially endorsed, *Noe* v. *FCC, supra,* at 742 (quoting *WBNX*), and although some 36 years old is still routinely invoked by the Commission in hearing designation orders when an applicant, such as Pillar, proposes "predominantly religious programming" but does not indicate an intention to provide broadcast time to others who do not share the same religious precepts as the applicant. *See, e.g., GACO Communications Corp.,* 45 Fed. Reg. 66866, published October 8, 1980; *David Livingstone Missionary Foundation, Inc.,* BC Mimeo 26722 (BC Doc. No. 80-80), released February 28, 1980.

It is important to emphasize here that "fair break" is not a Fairness Doctrine offshoot. Indeed, *WBNX* preceded the 1959 "fairness" amendment to Section 315(a) of the Communications Act, which speaks of the broadcaster "obligation . . . to afford reasonable opportunity for the discussion of conflicting views on issues of public importance," by 11 years. If anything, "fair break" is among the Fairness Doctrine's parents. And with appropriate parental magnanimity it is a broader doctrine. While the Fairness Doctrine can be invoked only in the context of discussion of "controversial issues of public importance," *Fairness Doctrine Primer,* 40 FCC 598, 599 (1964), no such threshhold exists for "fair break." Although no organization or individual has a right of *access* to a frequency, *CBS* v. *DNC,* 412 U.S. 112 (1973), the "fair break" doctrine stands as a sentinel against a broadcaster's intentional and systematic *exclusion* of views with which it disagrees — if the basis for exclusion is a discriminatory private or business purpose — regardless of whether controversial issues are involved. In other words, it helps ensure that a broadcaster will carry out its programming judgments without bigotry ("the obstinate and unreasoning attachment to one's own belief and opinions with intolerance of beliefs opposed to them," Webster's Third New International Dictionary 214 (1971)).

In light of Pillar's predominantly religious programming and apparent lack of a "fair break" caveat, it is unclear why the Hearing Designation Order herein, 47 Fed. Reg. 35037, published August 12, 1982, did not contain a "fair break" issue. The matter is not treated at all in the HDO. In any event, on September 13, 1982 RNJ filed a motion to enlarge issues to remedy the omission. There, and in its October 22, 1982 reply to the oppositions filed by Pillar and the then-Broadcast Bureau (now Mass Media Bureau), it detailed its charges that "non-Protestant religions are not given, and will never be given, a 'fair break' on WAWZ(FM) by Pillar." RNJ Reply at 8. In its petition RNJ asserted that Pillar intentionally and systematically excludes the programming of Jewish and Catholic groups, in particular, showing that WAWZ(FM)'s program director James M.

Pearsall refused to air a paid musical program produced by the World Jewish Broadcasting Network because "WAWZ-FM is listed as a 'religious' station, or 'Christian' station, which means, of course, that our programs and music reflect that philosophy" (April 18, 1981 letter to David Field from Pearsall, Exh. F to RNJ petition) and that during WAWZ(FM)'s 1978-81 composite week there were 44 religious public service announcements (PSA's) of which none related to Jewish organizations and only two related to Catholic organizations (Ex. H to RNJ petition).

The Bureau's opposition did not address why the HDO contained no "fair break" issue or why it should not be automatically added. Instead it maintained that the doctrine does not apply to a broadcaster's entertainment programming judgments, but only to news, public affairs, and other non-entertainment programming; that RNJ's PSA showing covered too small a segment of WAWZ(FM)'s three-year license period to be persuasive; and that there was no evidence that anyone asked the licensee to run a PSA espousing different religious views and was refused. While these points have some facial merit, they were effectively (albeit unintentionally) rebutted by Pillar's own opposition pleading. It proudly reported that during 1978-81 it broadcast one 15-minute Catholic program per week and two 15-minute "Jewish" programs admittedly produced by "Jewish Christians." It also asserted that "for many years" *prior to the license period under examination* a Somerville Rabbi "participated" in WAWZ(FM) programming. Pillar Opposition at 12. Finally, it presented a list of more than 200 Jewish and Catholic PSA announcements covering the periods June-December 1978 and January-May 1981 in an attempt to show that it had "regularly" broadcast "numerous" such announcements, Opp. at 13, but only two of the PSA's in that 12-month period were Jewish. Moreover, in its reply RNJ provided an affidavit by Father Jerry Wieciek, director of radio and television operations for the Diocese of Trenton (which then included Somerset County), averring that during 1977-82 he made repeated efforts to have WAWZ(FM) broadcast Catholic PSA's and weekly public affairs programs that his office produced, and that he was "never . . . successful in placing anything on WAWZ, despite repeated calls and even registered mail." RNJ Reply, Exh. 4 at 1 (Sept. 20, 1982 affidavit). By Memorandum Opinion and Order, FCC 82M-3433, released November 3, 1982, the ALJ denied RNJ's requested issue against Pillar, concluding that RNJ had failed to establish that a substantial question of "religious unfairness" was raised by its pleadings; however, he authorized RNJ to explore the question of "systematic exclusion" by Pillar of other religions at hearing under the standard comparative issue "since the programming of a licensee during its last license period is of primary significance in the comparative context." *Id.*

RNJ excepted to the ALJ's failure to add a specific "fair break" issue against Pillar, and I share its belief that the preceding evidence established a *prima facie* case against Pillar. Because "fair break" is properly explored as a basic qualifying issue as well as a comparative matter, *see David Livingstone Missionary Foundation, Inc., supra*, the ALJ's error in not designating the issue would normally require remand to determine whether Pillar's clearly discriminatory attitude toward non-Protestant programming is inconsistent with its public interest obligations and warrants its disqualification. *See Young People's Assoc. for the Propagation of the Gospel*, 6 FCC 178, 180 (1938) (application for new station denied where applicant would extend his facilities "only to those whose tenets and beliefs in the interpretation of the Bible coincide with those of the applicant"). However, remand is not required in the instant case because a full record has been compiled on this matter under the comparative issue, and it is adequate to destroy Pillar's renewal expectancy and result in grant of RNJ's application without formally disqualifying Pillar.

At hearing, contrary to the ALJ's conclusions in the Initial Decision, Concls., para. 10, and to the Review Board majority, Pillar failed to overcome the *prima facie* evidence of lack of "fair break" discussed above. Indeed, the later evidence is even more incriminating. First, the ALJ found that Pillar's governing "Discipline" adverts to "many false movements" such as Christian Science and Mormonism, criticizes "Popish doctrine," and believes in the "Restoration of the Jews." I.D., Finds., 102. During the 1978-81 license period, WAWZ(FM) broadcast no programs directed to Jewish people other than to persuade them to become Christians, no Rabbis appeared on the station, and Pillar could cite no religious programs that reflected a religious philosophy other than a Christian philosophy. *Id.*, para. 104. Reverend E. Jerry Lawrence, supervisor of the station's financial and legal concerns, denied that Pillar had a policy of keeping Jewish religious beliefs off the air, but Reverend Robert B. Dallenbach, Pillar's broadcast policy coordinator, acknowledged that he would not broadcast material he felt was contrary to the "very central thrust of Christianity, that someone not accept Jesus." *Id.*, para. 105. Dallenbach would permit a Rabbi to express his opposition to the proselytizing thrust of Pillar's Jewish-Christian programming, however, *id.*, para. 106, and Lawrence testified that he unsuccessfully attempted to get Rabbis to broadcast during the license period, Tr. 360-61 (but his testimony implies that he never personally spoke to any Rabbi about it, Tr. 375).[2], [3]

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[2] There was also testimony that Rabbis appeared on the station both before and after the license period, I.D., n. 59, but that is irrelevant to evaluating Pillar's programming performance *during* the license period.

Second, as to Catholic programming, the ALJ found that there was absolutely no Catholic news or public affairs programming aired on WAWZ(FM) during the 1978-81 license period. (The Maryknoll program alluded to by the ALJ at paragraph 10 of his Conclusions was broadcast by a different station — WAWZ(AM). Tr. 377,575.) And the ALJ's Findings, paras. 116-127, do not contradict Father Wieciek's earlier affidavit that described his unsuccessful efforts to get WAWZ(FM) to broadcast any public affairs program or PSA's prepared by his office. However, there were 96 PSA's for the U.S. Catholic Conference, 46 for the Catholic Relief Services and 179 for the Franciscan Fathers, plus an unspecified number of locally-originated Catholic PSA's. I.D., Concls., para. 10.

Under these circumstances, I am completely at a loss to understand how the I.D. could conclude (and the Board's majority, affirm) that RNJ's contention that Pillar did not provide a "fair break" to Judaism and Catholicism in its program policies is "belied by the record evidence and rejected." Concls., para. 10. Implicit in that judgment is the view that innocuous PSA's can make up for the total absence of substantive news and public affairs programs and that even the PSA's need not be locally oriented. If this is the law, then the "fair break" doctrine is dead. Not having read any obituary, I reluctantly conclude that the Board majority and the ALJ have interpreted the doctrine too narrowly.

As indicated at the outset, the Commission's concern since 1948 has been that a station licensee's systematic exclusion of beliefs that are at odds with its own effectively converts a public trusteeship into a mere extension of the licensee's personal affairs. Despite technological and deregulatory advances, there are not sufficient broadcast frequencies available to encourage such "private" stations, and there is accordingly little (or no) public interest justification for the renewal of such a license.[4] Therefore, we are obliged to examine the nature and extent of any alleged exclusionary policy or practice by a licensee — which may connote bigotry — and the basis for that policy or practice. In this inquiry, the "fair break" doctrine does not guarantee that all or any religious groups will be heard on WAWZ(FM), but it does protect all groups against being discriminatorily *silenced* because of a licensee's non-public interest

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[3] I pass over the record's elaboration of the World Jewish Broadcasting Network — David Field stalking-horse episode because I basically share the Board majority's ultimate conclusions that the effort was not improper but proved nothing, except to the extent that Pearson's April 18, 1981 letter, *supra*, shows that the proffered music was not rejected on music format grounds alone.

[4] For a further exposition of this point, see *Southeastern Bible College, Inc.*, 85 FCC 2d 936, 942, 49 RR 2d 243, 247-48 (Rev. Bd. 1981) (Board Member Ohlbaum, concurring dubitante).

programming judgments.[5]

Because the religious orientation of a licensee is irrelevant, *Noe, supra,* commands us to focus attention on a station's actual broadcast policies and practices, and to ignore its licensee's religious doctrines unless they are applied in the station's operations. While the *Noe* court detected a difference between doctrine and practice in its case, I cannot say the same here. It is quite clear that Pillar's narrowly sectarian religious philosophy guides WAWZ(FM)'s operations, and that Jewish and Catholic programming are being systematically excluded for discriminatory reasons despite efforts to gain access.

Even in this era of deregulation, when the Commission is reexamining the types of character issues that may result in disqualification or comparative demerit, *Notice of Inquiry, Gen. Docket No. 81-500,* 87 FCC 2d 836 (1981) (FCC Policy on Character Qualifications), it is clear that broadcast-related delicts are of paramount concern. *Id.* Surely the bigoted exclusion of programming by and for Jewish and Catholic listeners by WAWZ(FM) qualifies as such a delict. Accordingly, I believe that *United Broadcasting Co., Inc., supra,* dictates that Pillar should not receive a renewal expectancy for its seriously flawed programming performance during the 1978-81 license period at WAWZ(FM). Its abuse of a licensee's broad programming discretion cannot be ignored or condoned.[6]

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[5] The Board majority's discourse on the plethora of Protestant and other religions that were or were not "represented" on WAWZ(FM) during the license period is beside the point. I agree that neither the Fairness Doctrine nor the "fair break" doctrine includes an "equal time" or "equal opportunities" stricture. However, according to a 1980 *Pillar* survey, Roman Catholics constituted the second largest religious group among WAWZ(FM)'s listeners and Somerset County (the heart of the station's service area) includes areas of heavy Catholic concentration. I.D., Finds., para. 126. In addition, official notice is taken that the Jewish population of Somerset County is 6,000, and that an additional 22,500 Jews live in "Raritan Valley," which includes the city of Somerset (1983 American Jewish Year Book, 136). These audiences are too numerous to be cavalierly ignored by either Pillar or the Review Board.

[6] That licensees overcame "fair break" doctrine charges in *Queen City Broadcasting Co., Inc.,* 69 FCC 2d 1775 (1978), and in *K.C.O.D. Broadcasting Corp.,* 11 FCC 2d 349 (Rev. Bd. 1968), does not suggest vindication of Pillar here. In both of those cases the religious broadcaster licensees demonstrated extensive efforts to obtain the participation of other religious groups in regular and special programming that would appeal especially to those groups. This is the customary practice among religious broadcasters, and it goes far in substantiating their "fair break" policies. Pillar's policies and practices during 1978-81 were rather different.

FCC 84D-36

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Pillar of Fire	BC Docket No. 82-471 File No. BRH-810129VE
For Renewal of License of Station WAWZ(FM) Zarephath, New Jersey	
Radio New Jersey Somerville, New Jersey	BC Docket No. 82-472 File No. BPH-810430AC
For Construction Permit	

Appearances

Dennis F. Begley, *Matthew H. McCormick* and *William B. Rosenburg* on behalf of Pillar of Fire; *Lawrence Roberts* and *Eugene F. Mullin* on behalf of Radio New Jersey; and *Lawrence Bernstein* and *Brian P. Kilbane* on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ACTING CHIEF ADMINISTRATIVE LAW JUDGE THOMAS B. FITZPATRICK

Issued: May 23, 1984; Released: May 30, 1984

Preliminary Statement

1. This proceeding involves the mutually exclusive applications of Pillar of Fire (Pillar) for renewal of its license for Station WAWZ(FM), Zarephath, New Jersey, and Radio New Jersey (RNJ) for a construction permit for a new FM station utilizing the same frequency in neighboring Somerville, New Jersey. By *Memorandum Opinion and Order* (*Designation Order*) (FCC 82-346), released August 6, 1982, the Commission

designated the applications for hearing on the following issues:[1]

(a) To determine which of the proposals would, on a comparative basis, better serve the public interest; and

(b) To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted.

2. By *Memorandum Opinion and Order* (FCC 82M-3433), released November 3, 1982, the Presiding Judge denied RNJ's request for a "fair break" issue. However, it was ruled that the standard comparative issue encompassed an evaluation of whether Pillar systematically excluded other religions in its programming during the license period.

3. By *Memorandum Opinion and Order* (FCC 82M-3483), released November 5, 1982, the Presiding Judge enlarged the issues as follows:[2]

> 3. To determine whether Radio New Jersey published and distributed misleading "Fact Sheets" concerning the coverage area for Station WRNJ, Hackettstown, New Jersey and, if so, the effect of such conduct on its comparative qualifications.

4. A prehearing conference was held on October 8, 1982. Hearing sessions were held on February 22-25, 1983 in Washington, D.C. Further hearing sessions were held in Newark, New Jersey, on April 18-20, 1983 and in Washington, D. C., on June 7-9, 1983. The Presiding Judge received a joint exhibit in evidence and closed the record by *Order* (FCC 83M-2361), released July 21, 1983. Proposed Findings of Fact and Conclusions of Law were filed by Pillar and RNJ on September 30, 1983. Replies were filed on October 31, 1983.

Findings of Fact

I. The Comparative Issue

A. The Communities and Areas To Be Serviced

5. As noted, *supra*, this proceeding involves Pillar of Fire's (Pillar) application for renewal of its license for Station WAWZ-FM, and RNJ's competing application for a construction permit to establish a new FM broadcast station in Somerville, New Jersey, utilizing the frequency currently held by Pillar. Station WAWZ-FM operates on 99.1 MHz,

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[1] The Commission held that the existing record did not justify the designation of a §307(b) issue. The Commission found that although the Pillar (Zarephath) and RNJ (Somerville) applications are for different communities, RNJ has proposed a transmitter site only 770 feet from the present Station WAWZ-FM site that is located between Zarephath and Somerville. The Commission noted that effective radiated power (ERP) of both stations is nearly identical: 37 kW for Station WAWZ-FM and 36.5 kW for RNJ; there is only a one foot difference in the height above average terrain of the two antennas, and that the transmitter sites, ERP and HAAT indicate that the coverage of the two stations will be essentially the same. *Designation Order* (FCC 82-346), p. 1, n. 1

[2] The burden of proceeding with the introduction of evidence on this issue was placed upon Pillar and the burden of proof was placed upon RNJ.

Channel 256, with power of 37 kW (H&V), 570 feet HAAT. RNJ proposes to operate with power of 36.5 kW (H&V), 571 feet HAAT. There are numerous other AM and FM stations providing service to Station WAWZ-FM's 1 mV/m contour. (Joint Ex. 1, p. 2)

6. Station WAWZ-FM is licensed to Zarephath, New Jersey. RNJ proposes Somerville, New Jersey as its community of license. (RNJ Ex. 6, p. 1) Station WAWZ-FM is the only full-time station licensed to a community in Somerset County, New Jersey. Zarephath is located approximately 5 miles from Somerville and is in approximately the center of Somerset County. (TR 99, 248, 459, 500-01, 533)

7. According to U.S. census data, Somerset County's 1980 population was 203,129. The County includes the following political subdivisions. (RNJ Ex. 41, p. 6):

	Population
Bedminster township	2,469
Bernards township	12,920
Bernardsville borough	6,715
Bound Brook borough	9,710
Branchburg township	7,816
Bridgewater township	29,175
Far Hills borough	677
Franklin township	31,358[3]
(including Somerset)	21,731
Green Brook township	4,640
Hillsborough township	19,061
Manville borough	11,278
Millstone borough	530
Montgomery township	7,360
North Plainfield borough	19,108
Peapack and Gladstone borough	2,038
Raritan borough	6,128
Rocky Hill borough	717
Somerville borough	11,973
South Bound Brook borough	4,331
Warren township	9,805
Watchung borough	5,290

8. Zarephath, which encompasses 800 acres, is located within Franklin Township. (TR 1781) It is not listed as a political subdivision in the 1980 U.S. Census report. (RNJ Ex. 41, p. 6) Zarephath serves as one of Pillar's two headquarters. (Pillar Ex. 1, p. 2; TR 178)

9. Somerville, the community designated by RNJ, is the commercial hub of the Somerset County area. (TR 695) Somerset County's administrative offices are located in Somerville. (Pillar Ex. 24, p. 1)

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[3] Franklin Township's 1980 population of 31,358 included 7,028 Blacks, 33 native Americans, 642 Asians and Pacific Islanders and 706 persons of Hispanic origin. (RNJ Ex. 41, p. 20)

10. Somerset County is also served by daytime-only Station WBRW(AM)[4], and Pillar's Station WAWZ(AM), a share-time station licensed to Zarephath. (Pillar Ex. 3, p 1; TR 532-33) Local newspapers include the Somerset Messenger-Gazette, Bridgewater Courier-News, Somerset Spectator, New Brunswick Home News, Franklin News Record and Bound Brook Chronicle. The Courier-News and Home News are daily papers. (TR 200,246-47, 489, 864, 1253)

B. Pillar of Fire

(1) Make-up of Pillar, Licensee of Station WAWZ-FM

11. Pillar of Fire, licensee of Station WAWZ-FM is a religious organization, a Christian service agency. Among its endeavors are evangelism, Christian education, missionary enterprise (domestic and foreign), publishing, farming and broadcasting. Like the Salvation Army, Pillar comes from a Wesleyan background. The Pillar of Fire movement had its beginnings in Denver, Colorado in 1901. A corporation was formed there in 1902. In 1917, the Pillar of Fire movement moved its national headquarters to the East Coast. In May of that year, it organized a New Jersey non-stock, non-profit corporation under the name of "The Pentacostal Union." Zarephath, New Jersey, was designated as the principal place of business. In October, the corporation's name was changed to its present name, Pillar of Fire.[5] (Pillar Ex. 1, pp. 1-2; Pillar Ex. 2, p. 1)

12. In the 1920s, the Pillar of Fire movement became interested in broadcasting. The first Pillar of Fire broadcast facility, Station KPOF, Denver, was authorized by the Federal Radio Commission in 1927 and went on the air in 1928. Pillar began operation of Station WAWZ(AM) at Zarephath in 1931 and of Station WAWZ-FM in 1954. In 1962, Station WAKW-FM, Cincinnati, Ohio, went on the air. (Pillar Ex. 1, pp. 2-3)

13. As of the time the record was closed in this proceeding, the Officers and Trustees of Pillar were as follows (Pillar Ex. 2):

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[4] Station WBRW(AM) is dually licensed to Somerville-Bridgewater.

[5] The New Jersey non-stock, non-profit corporation, Pillar of Fire, the licensee of Stations WAWZ-FM and WAWZ(AM), Zarephath, New Jersey, will be referred to hereinafter as "Pillar".

Name	*Residence Address*	*Office Held*
Arlene White Lawrence[6]	Belle Mead, N.J.	President/Trustee
E. Jerry Lawrence[6]	Belle Mead, N.J	First Vice President/ Trustee
Lois R. Stewart	Zarephath, N.J.	Second Vice President/ and Treasurer/Trustee
Mildred W. Portune	Zarephath, N.J.	Secretary
Bertha H. White[7]	Zarephath, N.J.	Trustee
Harry Ross	Chicago, Ill.	Trustee
Robert B. Dallenbach[8]	Westminster, CO.	Trustee
William S. Sharpe	Westminster, CO.	Trustee

(2) Other Media Interests

14. Pillar is also the licensee of Station WAWZ(AM), Zarephath, New Jersey, which operates under a share-time agreement with Station WBNX, New York, New York. Under the share-time agreement presently in effect, Station WAWZ(AM) operates 31 hours a week and Station WBNX operates 137 hours a week. (Pillar Ex. 3) Station WAWZ(AM) renders 0.5 mV/m service to approximately 37% of Station WAWZ(FM)'s 1 mV/m service area. Virtually all of the 0.5 mV/m contour of Station WAWZ(AM) is encompassed within the 1 mV/m contour of Station WAWZ(FM) (Joint Ex. 1, Fig. 11).

15. A Colorado non-stock, non-profit corporation, also named Pillar of Fire, is the licensee of Station KPOF(AM), Denver, Colorado. An Ohio non-stock, non-profit corporation, also named Pillar of Fire, is the licensee of Station WAKW-FM, Cincinnati, Ohio. (Pillar Ex. 3) Denver and Cincinnati are, respectively, approximately 1,550 and 500 miles from Zarephath.

16. The officers and trustees of Pillar also have the following relationships with the Colorado and Ohio corporations (Pillar Ex. 3):

1. Arlene White Lawrence, President of the Board of Trustees of Pillar (New Jersey) is President of the Board of Trustees of Pillar (Colorado) and Pillar (Ohio).
2. E. Jerry Lawrence, First Vice President of the Board of Trustees of Pillar (New Jersey), is Vice President and a Trustee of Pillar (Colorado) and Pillar (Ohio).
3. Bertha H. White, a Trustee of Pillar (New Jersey), is Assistant Secretary of Pillar (Colorado).
4. Robert B. Dallenbach, a Trustee of Pillar (New Jersey), is a Trustee of Pillar (Colorado) and General Manager of Station KPOF, Denver, Colorado.

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[6] Husband and wife.

[7] Stepmother of Arlene White Lawrence.

[8] Brother-in-law of Arlene White Lawrence.

Pillar of Fire (Colorado) has seven Trustees and Pillar of Fire (Ohio) has five Trustees. (TR 84-85)

17. The Pillar of Fire group of stations has three separate corporate licensees; they are linked together as a single church organization. (TR 86, 159) As noted, *supra*, the corporations share the same President, Bishop Arlene White Lawrence, and Vice-President, E. Jerry Lawrence. Bishop Lawrence, as General Superintendent of the Pillar of Fire Church and President of the Pillar of Fire licensee corporations, is responsible for the overall supervision of the four broadcast stations. (Pillar Ex. 4, pp. 1, 3; TR 217)

18. The four stations also share the same policy coordinator, Robert B. Dallenbach and administrative supervisor, Elmer Smith. (Pillar Ex. 6, pp. 1-3) The four stations have essentially the same operating policies and perspective and broadcast on commercial frequencies on a not-for-profit basis.[9] (TR 86-87, 110) A number of the programs broadcast on Station WAWZ-FM are also broadcast on the Denver and Cincinnati stations. (TR 88-92, 174-76)

19. Pillar publishes two magazines that are written, edited and printed in Zarephath. "Pillar of Fire" is a 16-page journal published bi-monthly. "Pillar of Fire Junior" is the other magazine. (TR 136-38) Both publications are religious journals with homilies, Sunday School lessons, devotional materials, news of Pillar school events and reports on radio activities. (TR 136) Pillar also publishes a Zarephath books and publications written by Pillar clergy. (TR 139, 172)

(3) Integration of Pillar's Trustees

20. As noted, *supra*, Pillar is governed by a seven member Board of Trustees. (TR 94, 180; Pillar Ex. 2, p. 1) No member of the Board participates in the day-to-day operation or management of Station WAWZ-FM on a full-time basis.

21. *Bishop Arlene White Lawrence* was born in Zarephath and presently is a resident of Bell Mead, New Jersey, which is located approximately five miles from Zarephath. She spends five to six days a week at Zarephath. She received an Associate of Arts Degree from Belleview College, Denver, 1936; a Bachelor of Arts Degree from Alma White College, Zarephath, 1941; and a Master of Arts Degree in Music from Columbia University, New York City, 1963. Since 1974 she has been a Bishop of the Pillar of Fire and since 1978 she has been National President and General Superintendent of the Pillar of Fire and its related corporations. (Pillar Ex. 4, pp. 1-2) Bishop Lawrence is President of the

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[9] Pillar does not sell commercial spot announcements or promote on Station WAWZ-FM the sale of commercial products or services. (Pillar Ex. 1, p. 5, n. 2)

Zarephath Bible Seminary. She is writing editor of Pillar Magazine and Pillar Church News. (Pillar Ex. 4, p. 3)

22. Bishop Lawrence is the granddaughter of Alma White, the founder of the Pillar movement and the first President and Superintendent of Pillar. Alma White died in 1946. She was succeeded as President and General Superintendent by her eldest son, Arthur K. White. Arthur K. White was succeeded as President and General Superintendent in 1980 by Bishop Arlene White Lawrence, his daughter. (TR 81-82)

23. Bishop Lawrence has been involved with Pillar of Fire broadcast stations since 1928. She has been, at one time, Assistant Program Director of Stations WAWZ, WAWZ-FM and KPOF. Previously as Vice President, and now as President of Pillar, she has been active in overall supervision of the four stations. (Pillar Ex. 4, p. 1)

24. Bishop Lawrence is a member of the following civic and public service organizations (Pillar Ex. p. 2; TR 209-16):

Member, Washington Campground Association,
South Bound Brook, New Jersey.

Member, Juvenile Diabetic Association, Belle
Mead, New Jersey.

Member, American Diabetes Association of New
Jersey, Affiliated, Inc.

Member, American Diabetic Association of New
York City.

Member, Joslin Diabetic Center, Boston,
Massachusetts.

Member, National Trust for Historic Preservation,
Washington, D. C.

Member, National Religious Broadcasters
Association.

Member, International Platform Association.

Member, New Jersey Historic Commission,
Neshanic, New Jersey.

Member, Quest Club, Columbia University,
New York City.

25. Bishop Lawrence presently devotes a minimum of 10 hours per week to the operation of Station WAWZ-FM. She acts as an interviewer on radio broadcasts as well as preparing and hosting a regular weekly program, "Children's Bible Story." She also prepares and broadcasts weekly sermons and Bible studies which cover a variety of subjects such as patriotism, peace, alcoholic problems, Bible lessons, history and topics of current interest. In addition to being personally present at Station

WAWZ-FM on nearly a daily basis,[10] she monitors the station's programs[11] and confers on matters relating to station operation with Rev. Robert Dallenbach, the Pillar Trustee responsible for the coordinated operation of the Pillar stations; Elmer Smith, the Director of Broadcasting; S. Rea Crawford, Station WAWZ-FM's General Manager[12], and James Pearsall, the Station WAWZ-FM's Program Director. As President of Pillar, she is ultimately responsible for the station's programming with the day-to-day operation of the station delegated to Crawford. (Pillar Ex. 4, pp. 3-4)

26. *E. Jerry Lawrence*, spouse of Arlene White Lawrence, was born in Madison, Georgia and presently is a resident of Belle Mead, New Jersey. His daily activities are at Zarephath. He has received the following degrees: Associate of Arts, Belleview College, Denver, 1939; a four year diploma, Zarephath Bible Seminary, Zarephath, 1941; Bachelor of Arts, Alma White College, Zarephath, 1943; Master of Arts (History), University of Colorado, Denver, 1951; Master of Arts (Education), Columbia University, New York City, 1960; and Doctor of Education (Administration), Columbia University, New York City, 1966. (Pillar Ex. 5, p. 1)

27. Reverend Lawrence was an instructor at Belleview Preparatory School, Denver, from 1944 and 1947; the campus pastor from 1944 to 1945; and Professor and Acting Dean of Belleview College from 1947 to 1955. He was a Professor at Alma White College, Zarephath; Dean from 1958 to 1965; Vice President from 1965 until the late 1960's; and President from the last 1960's until it closed in 1975. (Pillar Ex. 5, p. 2) Rev. Lawrence is President of the Temple Christian Day primary school and the Alma Preparatory secondary school. (TR 303-04) These schools are accredited by the Pillar of Fire, but not by the State of New Jersey. (TR 304) Rev. Lawrence belongs to two local "ham" clubs and holds an advanced amateur license. (Pillar Ex. 5, p. 2)

28. Rev. Lawrence has been involved in broadcasting with Pillar of Fire stations since about 1935. From 1935 to 1939 he was a control operator at Station KPOF. From 1939 to 1943, intermittently, he controlled the daily programs from Station WAWZ(AM). He began his formal broadcast ministry after his ordination in 1937. Then, until 1939, he broadcast weekly Bible lessons on Station KPOF. From 1941 to 1943, he led weekend services broadcast on Station WAWZ(AM) from the Pillar of fire Temple located in Bound Brook, New Jersey. From 1944 through

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[10] Bishop Lawrence spends eight or nine months a year in the Zarephath area. (TR 292)

[11] Her monitoring of Station WAWZ-FM programming involves listening to them while she travels back and forth between the station and her home, a distance of 5 miles. She does not listen to Station WAWZ-FM during the regular work day. (TR 292; Pillar Ex. 4, p. 1)

[12] Mr. Crawford occasionally was referred to as the "Station Manager," as well as the "General Manager." Pillar used the terms synonymously.

1958, he gave weekly Bible lessons from the studio and broadcast weekend services over Station KPOF. From 1956 to 1959 he conducted news broadcasts over Station WAWZ(AM). From 1958 through the hearing in this proceeding, he conducted one or more weekly broadcasts of mid-week services and one or more congregational services over Stations WAWZ(AM) and WAWZ-FM, in addition to weekly Bible lessons from the Zarephath chapel.

29. At the time of the hearing, Rev. Lawrence devoted a minimum of 20 hours a week to Station WAWZ-FM, supervising the financial and legal aspects of the station's operation and participating in station programming. He attended meetings of the station's staff to insure compliance with FCC rules as well as adherence to the policies of the licensee's Board. He had daily contact with the operators, the Program Director and the General Manager of Station WAWZ-FM; however, he is generally not involved in the selection of programs to be broadcast on Station WAWZ-FM. (Pillar Ex. 5, p. 3; TR 307)

30. *Robert B. Dallenbach* was born in Middlesex County, New Jersey and presently is a resident of Westminster, Colorado. He lived at Zarephath during the periods 1940-1949, 1952-1954, 1955-1958, 1962-1963, and 1965-1966. He has received the following degrees; Bachelor of Arts, Alma White College, 1949; Master's Degree (Physics), Columbia University, New York City, 1956; Ph.D. (Educational Media), University of Colorado, 1973. (Pillar Ex. 6, p. 1)

31. Rev. Dallenbach has been involved with broadcasting over Pillar of Fire stations since the mid-1940s. He was Assistant Station Manager and Assistant Program Director. He has held a variety of positions with the stations. From 1963 through 1972, he was Assistant Manager of Stations WAWZ(AM), and WAWZ-FM. Since November 1966 he has been General Manager of Station KPOF. (Pillar Ex. 6, pp. 1-2)

32. In addition to his involvement with the Pillar stations, Rev. Dallenbach has been the President of Belleview College in Westminster since 1974, a teacher in the Belleview school system since 1949 and assistant pastor at Alma Temple in Denver since 1949. (Pillar Ex. 6, p. 2)

33. Dallenbach devotes a minimum of 5 hours a week to the operation of Station WAWZ-FM. He has been involved in the operation of all Pillar stations for many years. Since 1980 he has been responsible to the Board of Trustees for the coordinated operation of all the Pillar stations. He coordinates with all general managers to insure compliance with FCC requirements and adherence to the policies of Pillar of Fire.[13] Rev. Dallenbach also works with the Director of Broadcasting, Elmer Smith,

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[13] Prior to 1980, Bishop A. R. Stewart was the Trustee primarily responsible to the Board for the operation of the Pillar stations. Bishop Stewart was a resident of Zarephath and an active participant in the operation of Station WAWZ-FM. However, due to failing

who is responsible for the overall administrative supervision of the stations in matters relating to engineering, and compliance with FCC rules and policy. Rev. Dallenbach visits Station WAWZ-FM to confer with its General Manager, S. Rea Crawford, and the Trustees of Pillar. He also regularly consults by telephone with Messrs. Smith and Crawford and the Board of Trustees to discuss the operation of the station. (Pillar Ex. 6, pp. 2-3)

(4) Trustees Supervision of the Operation of Station WAWZ-FM

34. During the 1978-81 license period, the Pillar Board of Trustees had ultimate responsibility for the operation, policies and programming of Station WAWZ-FM. (TR 94, 180) The ultimate decision-maker within the Board was Bishop Lawrence, who was the President of the Board and the General Superintendent and spiritual leader of the Pillar Church. (TR 180, 217, 284) However, Bishop Lawrence could not recall the last time she was consulted about the selection of a regularly-scheduled syndicated program. (TR 224) She did not know whether Station WAWZ-FM broadcast any regularly-scheduled local news program during the license term. (TR 225, 228)

35. Major decisions and capital outlays required the approval of the Board of Trustees for Station WAWZ-FM. However, it met only on a spasmodic basis.[14] (TR 94, 308) At times, the Trustees were not aware of the particular monetary needs of Station WAWZ-FM. (TR 268) The Board did not establish written policies to govern the operation of Station WAWZ-FM. (TR 310) The Vice President of the Board, Rev. E. Jerry Lawrence, could recall no instance during the license period when the Board discussed the station's policy with respect to broadcasting local news. (TR 310-11) He was unable to give a specific example of an occasion when the Board was asked to approve or disapprove a particular program.[15] (TR 308) He acknowledged that the Board did not establish written policies for Station WAWZ-FM and had no policy with regard to informing its listeners about local crises. (TR 288-89, 310) The Board of Trustees did not discuss local news or public affairs programming, editorializing, election coverage or programming geared to the needs of the black population in Zarephath's home township of Franklin. (TR 316, 318, 324, 328-30, 518)

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health, Rev. Dallenbach gradually assumed Bishop Stewart's responsibilities. Bishop Stewart died in 1981.

[14] Reverend E. Jerry Lawrence explained that sometimes the Board of Trustees met three or four times a month, or once a month or "quite a few times through the year." (TR 308)

[15] Reverend Lawrence explained that he did discuss programs he heard on Station WAWZ-FM with the staff and Trustees and recommended, on occasions, that the program be continued on the station. (TR 308)

36. With respect to complaints and program requests from the public, the General Manager and Program Director had responsibility to keep the Board advised. (TR 365-67) However, Reverend Lawrence was unaware of the letters of complaint or letters requesting program time sent to the station and introduced into the record by RNJ. He learned of them after this proceeding began. (TR 363-66; RNJ Exs. 10 and 15-27; RNJ Ex. 35, pp. 79-86) In this connection, it is noted that the Board had a "variable policy" that the General Manager of Station WAWZ-FM would let the Board know of complaints. (TR 365)

37. During the license period, primary responsibility for day-to-day operation of Station WAWZ-FM resided with Bishop A. R. Stewart, the Director of Broadcasting and a Trustee, in conjunction with Rev. S. Rea Crawford, the General Manager, and James Pearsall, the Program Director. (Pillar Ex. 6, p. 3; TR 182, 1517)

38. As noted, *supra*, upon Bishop Stewart's death in 1981, Rev. Dallenbach assumed primary responsibility on the Board for programming and personnel. (TR 110; 297-98) Rev. Crawford assumed primary responsibility for day-to-day operation of Station WAWZ-FM. (Pillar Ex. 6, p. 3)

39. The Board has delegated primary responsibility for coordinating the operation of the Pillar stations and for advising the Station WAWZ-FM management on broadcast policies to Rev. Dallenbach, a resident of Colorado. During the license period, Rev. Dallenbach visited Zarephath about three or four times a year and frequently consulted with the Station WAWZ-FM management by telephone. That is still his practice. (Pillar Ex. 6, pp. 1-3; TR 95, 109, 117, 1983).

40. The Pillar Board has delegated to Elmer Smith, the Director of Broadcasting, responsibility for overall administrative supervision of Station WAWZ-FM in matters relating to engineering, compliance with Commission technical rules, ascertainment of community needs and ensuring that Station WAWZ-FM's public affairs programs meet those needs.[16] A resident of Great Mills, Maryland, Smith visited Zarephath about four times a year during the license period. He could not listen to Station WAWZ-FM while at his home in Maryland. (Pillar Ex. 6, p. 3; TR 119, 297-98, 605)

41. Decisions on religious and entertainment programs were made by James Pearsall, the Program Director, in conjunction with Rev. Crawford. (TR 112, 130, 182, 1517)

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[16] Smith has never been a Trustee or officer of Pillar. (TR 606)

(5) The Programming and Operation of Station WAWZ-FM During the License Period - 6/1/78 - 5/31/81

(a) Ascertainment of Needs and Problems

42. During the license period, June 1, 1978 to May 31, 1981, management level employees of Station WAWZ-FM conducted an ongoing survey in order to ascertain the problems and needs of the station's service area, which includes its home county, Somerset, and nine surrounding counties: Mercer, Hunterdon, Morris, Union, Middlesex, Warren, Sussex, Essex and Monmouth. A total of 310 community leaders in these ten counties were consulted during the license term. Of the leaders surveyed, 117 were women, 43 Black, 26 Hispanic, 2 Oriental and one Native American. Additionally, 300 members of the general public were surveyed during the six-month period prior to the filing of the 1981 license renewal application. On the basis of its ascertainment interviews, there was developed, for each year of the license term, a list of the most significant problems and needs of the station's service area. (Pillar Ex. 9, pp. 1-2, 13, 15-19)

43. Pillar's listing of significant problems and needs of the Station WAWZ-FM service area for the period including June 1, 1978 to January 31, 1979, cited the following significant problems and needs (Pillar Ex. 9, p. 15):

1. Taxes/Inflation/Better Government
2. Aged/Housing/Poverty/Urban Renewal
3. Education/Culture/Communication/Ethnic
4. Crime/Law and Order/Prison Reform
5. Transportation/Traffic/Parking

44. Pillar's listing for February 1, 1979 - January 31, 1980, included the same five categories, together with five additional categories (Pillar Ex. 9, p. 17):

6. Employment/Economy
7. Health/Welfare/Drugs/Alcohol
8. Pollution/Sewerage/Energy/Environment
9. Youth/Family/Divorce
10. Religious Reawakening/Apathy/Morality

45. The listing for February 1, 1980 - January 31, 1981 was identical to the 1979-80 listing. (Pillar Ex. 9, p. 19)

46. Pillar did not take general public interviews into consideration in preparing the problems and needs lists. (TR 612) Smith, who was responsible for ascertaining the needs and ensuring that Station WAWZ-FM's programming was responsive to the ascertained needs, explained that he did so because Commission Rules required only that Station

WAWZ-FM conduct the general public interviews, not that the station analyze them. (TR 612) The listings of issues submitted to the Commission were based solely on leader interviews. (TR 612) However, Smith further explained that the results of the general public interviews conducted during the last six months of the license period were analyzed and the results were found to be about the same as for the leader interviews conducted during the license period. (TR 612-13)

47. Although he had direct responsibility for seeing that Station WAWZ-FM's public affairs programs were meeting ascertained needs, Smith had no personal knowledge of the contents of any of the public affairs programs broadcast during the license period. Additionally, he did not monitor the programs and he had no access to them. (TR 119, 594, 604-05, 622; Pillar Ex. 6, p. 3) Smith conceded that Station WAWZ-FM did not plan any programs designed specifically to meet any of its ascertained needs. (TR 618)

48. In an effort to see to it that the station's programming responded to the ascertained problems and needs, the station made use of a "public affairs log," separate from the then-required program log. The public affairs log included entries for the name, time of broadcast and duration of a public affairs program as well as a brief description of the subject matter.

49. Smith posted a listing of the ascertained issues in the control room together with a public affairs log kept near the regular program log. (TR 571, 590, 624) The control operator on duty at the time would listen to the program and categorize each program according to the ascertained issues. For each public affairs program the control operator would list one of the ascertained issues next to the program name on the public affairs log. (TR 571, 582, 589-90)

50. During his visits to Zarephath, Smith would review the public affairs logs to see if the ascertained issues were being treated.[17] (TR 621) On each occasion he concluded, based upon the notations of the control operators, that Station WAWZ-FM was meeting its commitment to ascertained needs and interests. Smith, on his visits, discussed public affairs programming with Crawford, the General Manager. (TR 620-23)

51. Pillar acknowledged that the composition of its program schedule was not necessarily dictated by the demographic composition of the station's service area.[18] Dallenbach explained that "many times" the station's programming represented a response to those who evidenced an

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[17] Smith visited the station approximately every three months. (TR 620-23)

[18] See paragraph 46 of "Reply Proposed Findings of Fact and Conclusions of Law of Pillar of Fire" (Reply), filed October 31, 1983.

interest in participating in such programming.[19] (TR 148)

(b) Station WAWZ-FM's Programming During the License Period

52. Pillar's 1981 renewal application disclosed that during the composite week[20], Station WAWZ-FM was on the air for 127 hours and 23 minutes, signing on at 5:58 a.m. each morning and signing off a few minutes after midnight each evening. (RNJ Ex. 12) No local public affairs programs were broadcast during the composite week and approximately 11 minutes were devoted to local news, a program logged as Regional News Review on Saturday from 6:05 p.m. to 6:16 p.m.[21]

53. The majority of Station WAWZ-FM's composite week programming consisted of religious programs. Of the 127 hours, 23 minutes of programming broadcast during the composite week, Pillar logged approximately 68½ hours (53.5%) as religious programming. (RNJ Ex. 12, pp. 4-14) Pillar's entertainment programming (30% of total programming) was basically inspirational music.[22] (Pillar Ex. 7, p.1; Pillar Ex. 10, p. 7; RNJ Ex. 12; TR 557)

54. The composite week totals Pillar reported in its 1981 renewal application were as follows (Pillar Ex. 10, p. 7):

News (491 minutes)	6.42%
Public Affairs (283 minutes)	3.72%[23]
All Other Programs, Exclusive of Entertainment and Sports (and including religious) (4122 minutes)	53.93%
Public Service Announcements	80

55. Pillar's stated intention was to serve the cultural, civic, emotional and spiritual needs of its audience. (Pillar Ex. 7, p. 1) Crawford claimed that in molding Station WAWZ-FM's programming service during the license period, he took into consideration the types of radio programming available throughout the service area. (Pillar Ex. 7, p. 1; TR 472-73, 502, 534) However, Crawford, the General Manager, did not know whether

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[19] Pillar did not subscribe to a rating service to determine its acceptance in the community. (TR 251)

[20] Sunday - November 25, 1979; Monday - March 10, 1980; Tuesday - April 1, 1980; Wednesday - September 26, 1979; Thursday - January 10, 1979; Friday - July 27, 1979; Saturday - February 2, 1980. (RNJ Ex. 12)

[21] The station also broadcast one-minute weather reports once an hour after each UPI World News broadcast and several one-minute ski reports broadcast on Monday, March 10, 1979. (RNJ Ex. 12; TR 525) There were 90 local weather reports during the composite week. (RNJ Ex. 12) The Regional News Review and UPI World News are discussed, *infra.*

[22] 64.7% of Station WAWZ-FM's programming during the license period was non-entertainment programming.

[23] Two programs logged as public affairs were "Keys to Better Living" and "The Word and the World," which are discussed, *infra.* They represented 1.37% of the 3.72% total.

other area stations broadcast local news or local public affairs programming during the license period. (TR 542-43)

56. It is appropriate to consider the various elements which comprised Pillar's programming during the license term.

(1) News

57. *UPI News.* Throughout the license term Station WAWZ-FM subscribed to the audio service of United Press International. (Pillar Ex. 7, pp. 1-2) Station WAWZ-FM carried UPI World News on a regular schedule. (Pillar Ex. 7, p. 2) With occasional exceptions,[24] the newscast was broadcast between 12 and 15 times a day at the top of the hour. The newscasts were usually either four or five minutes in duration with one or two minute newscasts broadcast on occasion. (Pillar Ex. 7, pp. 1-2)

58. Station WAWZ-FM received UPI World News as an audio feed by telephone live directly into the broadcast console. The announcer on duty heard a warning cue and pressed a button. The news then went out over the air. The station did not have a UPI news ticker or any other facilities in the studio for the staff to monitor world, national, state or local news. (TR 104, 227, 326-27)

59. *Weather Reports.* Weather reports consistently followed the "UPI World News" broadcasts. In each of the first two years of the license term, approximately 4,500 minutes of air-time were devoted to local weather reports. During the third year, with the expansion of six daily reports from one minute to two minutes, the total air-time for weather reports increased to approximately 6,000 minutes.[25] Whenever inclement weather forced area schools to close or alter bus and class schedules, Station WAWZ-FM broadcast the information. In addition, the station broadcast announcements of meeting cancellations and closings of government offices and the Somerset County courts due to bad weather. Station WAWZ-FM broadcast reports on skiing conditions in various locations during the 1978-1979 and 1979-1980 ski seasons. (Pillar Ex. 7, p. 2; TR 914, 944, 955)

60. *Moral Majority Report.* A daily three and one-half minute report on current events, as viewed from the perspective of the Moral Majority was broadcast from September, 1980 through the end of the license term. (Pillar Ex. 7, p. 3; TR 152)

61. *Regional News Review.* The "Regional News Review," prepared by a member of the Station WAWZ-FM staff, provided a weekly summary

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[24] Station WAWZ-FM pre-empted all news broadcasts during the days that it broadcast "Shareathon" appeals for contributions from listeners. (TR 1483)

[25] In the first two years of the license term, Station WAWZ-FM broadcast 12 - 13 weather reports per day. During the third year of the license term, Station WAWZ-FM broadcast 16 - 17 weather reports per day. (Pillar Ex. 7, p. 2) The station obtained its weather reports by telephone from a weather service. (TR 248)

of the news in Somerset and adjoining counties. The program was broadcast on most Saturday evenings during the license term.[26] Topics regularly covered included the economy, education, employment, government, health and medical concerns, politics and taxes. The program also covered stories concerning the elderly, energy, farming, housing, pollution and transportation. (Pillar Ex. 62, p. 14-21, Pillar Ex. 63, p. 3-51)

62. The following listing of some of the stories carried on "Regional News Review" programs in June, 1980, illustrates the nature of the program:

> June 7, 1980: Residents of New Jersey seem to favor State aid for public transportation; although some traces of chemicals have been found, New Jersey's water is better than standards established by the Federal Government; gas prices are higher than last year even though most dealers have an abundant supply of gas; only about 28% of New Jersey's voters turned out for the Presidential primaries; Governor Byrne has approved an 11% increase in bus and train fares effective in July; survey shows New Jerseyans like the state and quality of life here.
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> June 14, 1980: Of all residents in New Jersey, 65% are opposed to the building of nuclear power plants; the New Jersey Assembly voted 69-0 in favor of giving the elderly a break on property taxes; gas prices are dropping for the first time in over a year; New Jersey commuters who relied on regular public transportation will not be able to ride special buses and trains during the Port Authority strike.
>
> June 21, 1980: New Jersey has decided to drop the minimum gas sale in effect since last June; the weekend and holiday bus shuttle to the ocean begins this weekend; a bill allowing Somerset County to vote on the Sunday Blue Law was approved by the Assembly; the Raritan Valley line has ordered 57 new passenger cars to upgrade its commuter rail system.
>
> June 28, 1980: A reduction in the use of water in Franklin Township has been ordered due to lack of rain; the Borough of Somerville has voted to raise the parking meter prices; unemployment has risen in New Jersey for the third straight month; tuition at Somerset County College is rising for the second year in a row; consumers in New Jersey are using less gas and home heating fuel in 1980 than last year; energy officials are predicting New Jersey residents will conserve energy this summer; after finishing 20 weeks of training, 30 women are graduating from the State Police Academy. (Pillar Ex. 63; pp. 33-35)

63. Coverage of the 1978 U.S. Senate primary and election contests was provided as was information relative to registration for the 1979 and

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[26] During the first year of the license period, Regional News Review was broadcast on 32 Saturdays and was 10 minutes in length. (Pillar Exs. 7, p. 3 and 62, p. 2) During the second and third years of the license period, Regional News Review was 10 minutes in length and was broadcast on 44 and 46 Saturdays, respectively. (Pillar Ex. 7, p. 3)

During the period October 28, 1978 and February 9, 1979, Station WAWZ-FM broadcast no local news program. Similarly, during the period July 20-August 29, 1980, and during the following periods July 2, 1978-July 14, 1978; September 10, 1978-September 29, 1978; March 4, 1979-March 16, 1979; June 10, 1979-June 29, 1979; July 15, 1979-August 10, 1979; September 23, 1979-October 5, 1979; December 16, 1979-December 28, 1979; February 15, 1981-February 27, 1981. These gaps occurred when either the station had no newsman or the newsman was on vacation. (TR 558-59, 1477-87)

1980 elections. (Pillar Ex. 62, pp. 14, 19, 20, 21; Pillar Ex. 63, pp. 19, 20, 30, 31-34, 36, 38, 40, 46, 51)

64. Ongoing stories were covered on Regional News Review as new developments occurred. For example, stories regarding the proposed "Bridgewater Commons" mall[27] were carried on at least six broadcasts. (Pillar Ex. 62, p. 6; Pillar Ex. 63, pp. 4, 8, 9, 10, 11)

65. The program was prepared primarily by Victor Capolunghi from June, 1978 through October, 1978[28], and by Kenneth Cope from February, 1979 through May 1981. Both gathered the news for the program by sifting through several local area newspapers and numerous press releases sent to Station WAWZ-FM. Additionally, Capolunghi, on occasion, would use actualities provided by various organizations, such as the U.S. Department of Agriculture. (Pillar Ex. 62, p. 2; Pillar Ex. 63, p. 1)[29]

66. Capolunghi, in deciding which stories to use on the program, considered whether the story was of local importance and whether it also would have appeal to Station WAWZ-FM's ten county service area. After selection, the stories were then edited for readability over the air. (TR 1439, 1405)

67. Capolunghi last prepared and broadcast Regional News Review on October 28, 1978. He had informed station management that he could no longer spend time doing the program. (TR 1413; Pillar Ex. 62, p. 21) Rev. Crawford, Pillar's General Manager, was concerned that Station WAWZ-FM no longer had a news reporter after learning of Capolunghi's decision to no longer handle the program. It was Crawford's hope that Capolunghi would reconsider. He made no overtures to anyone to replace Capolunghi, nor did he raise the matter with the Board of Trustees. Although he had no other staff members capable of taking over the task, he did not call any employment agencies or any other service in an attempt to replace Capolunghi. As a result, Station WAWZ-FM broadcast no local news program for more than three months. (TR 558-59, 1478)

68. In early 1979, Rev. Crawford contacted Kenneth Cope, a part-time Station WAWZ-FM staff operator and announcer, about extending his duties to include news. Cope lived in Zarephath and was a volunteer who

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[27] Bridgewater is located 3-4 miles from Zarephath. (TR 501)

[28] During the June 1978-October 1978 period, Capolunghi comprised the entire news staff. His involvement with local news was limited to his preparation and broadcast of Regional News Review. (TR 1403, 1413, 1425, 1459) The station didn't cover local news events on a live or on-the-spot basis. (TR 564, 1511-12)

[29] Capolunghi usually recorded Regional News Review on Friday afternoon or Saturday morning for broadcast on Saturday night. (TR 1403) He did not consider the program comparable to a news broadcast in the normal sense of providing a report of news that had taken place since the last time a listener heard a news broadcast. (TR 1440) Rather, since it was a news review program, a listener would often hear stories and events that occurred two to seven days earlier. (TR 1440)

worked for a nominal stipend. He had no news or journalistic training and so informed Crawford who asked him to "give it a shot." (TR 562, 1509) Rev. Crawford asked him to take responsibility for Regional News Review. (TR 562)

69. Cope, the only person at the station responsible for local news after February 1979, spent between two and three hours a week preparing the program by reviewing various local area newspapers each day. He chose articles on matters that he wanted to address, cut them out, edited them and taped the program on Friday night or Saturday morning for broadcast on Saturday evening.[30] (TR 1493; Pillar Ex. 63, pp. 1-2)

70. Cope acknowledged that it was difficult to serve the community with a local news program that lasted 10 minutes. (TR 1511-13)

(2) Coverage of Political Elections

71. As noted, *supra*, some coverage was given to election campaigns. However, since Station WAWZ-FM is, in the words of Reverend Dallenbach, a religious broadcast facility, Pillar did not make it "a primary factor" of its policy to take "strong sides" on political issues. It was felt that to do so would polarize the audience which it was attempting to serve with its religious programs. (TR 106-107) It was not the policy of the station to follow political elections on "a day-to-day basis." (TR 188)

72. The various political subdivisions in Somerset County have an elected governing body, as does the County itself. (TR 242, 1249-51) Pillar's public witnesses identified contested elections in Somerset County and some of its political subdivisions during the license period. Neither Capolunghi or Cope could recall reporting any local election results during the license term. Capolunghi explained that the results of the November 1978 local Somerset County elections were not reported on Station WAWZ-FM, in large part because at the time there was no local news on the station and Station WAWZ-FM had no local news reporter. (TR 1448-49) Kenneth Cope, who replaced Capolunghi in February 1979, could not recall making any effort to report election results on the station during the remainder of the license period. (TR 1477, 1503)[31]

73. James Pearsall, Station WAWZ-FM's Program Director, had no knowledge of any other coverage of candidates by Station WAWZ-FM in 1979 or 1980, unless it was done by UPI World News. (TR 1521) Bishop Lawrence, Pillar's President, expressed the belief that no candidate for Federal office had ever appeared on Station WAWZ-FM to advocate his or

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[30] In explaining the paucity of local news broadcast by Station WAWZ-FM, Reverend Dallenbach pointed out that it was not Pillar's policy to be "a primary news station" and that it was felt, in exercising its judgment as a licensee, that the 6.4% of the time devoted to news a fair percentage. (TR 187-88)

[31] Pillar's Program Director had no knowledge of election coverage unless it was on Regional News Review or UPI World News. (TR 1520)

her candidacy.[32] (TR 244) Pillar did not refuse any specific request from a candidate for air-time. Bishop Lawrence was of the opinion that Pillar had never been asked to make time available. (TR 244)

74. Pillar's public witnesses uniformly could not identify any local candidates who had appeared on Station WAWZ-FM. One, who was actively involved in local politics, related that candidates and public officials did not request time on Station WAWZ-FM because they felt it was not something with which the station wanted to become involved. (TR 882)

75. Station WAWZ-FM did not broadcast any interview programs with candidates for local public office prior to the 1980 election. (TR 474) As detailed, *infra*, elections were, to some extent, covered by the Rutgers University Forum program. However, that program, which was intended to be state-wide, did not provide coverage of the elections in Somerset County's political subdivisions. (TR 438)

76. On April 30, 1981, Roger Bodman sent a letter on the stationery of the Tom Kean for Governor Committee to James Pearsall, Program Director of Station WAWZ-FM. The letter read (RNJ Ex. 35, p. 80):

> Would you please send me your station's political rates and/or plans you may have for covering the political race for Governor.
>
> This information is needed to formulate Mr. Kean's campaign plans.
>
> Your prompt response is appreciated.

The letter did not identify Bodman's position, if any, with the Tom Kean for Governor Committee, and did not specifically request air-time on the station. Station WAWZ-FM General Manager Crawford responded, that Station WAWZ-FM was a non-commercial station, that the station did not sell spots to anyone; that a rate card was not available since "the spots are not available" on Station WAWZ-FM.

77. On October 22, 1980, Bodman had sent Pearsall a letter from the Courter for Congress Committee. The letter read as follows (RNJ Ex. 35, p. 82):

> Will you please be so kind to send me your current political advertising rates.
>
> In addition, do your have any plans for political coverage in the 13th Congressional District? A number of radio stations have set up interviews with Congressman Courter. If you have any interest, please feel free to contact me at 201-850-0868.
>
> As you know, the election is just two weeks away. A prompt response would be sincerely appreciated.

This letter did not specifically request air-time. Nor did it identify Bodman's position with the Courter for Congress Committee. Both

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[32] Rev. Crawford could not recall any instances during the license period when Station WAWZ-FM gave access to candidates for Federal office other than a notice for Bill Bradley on Community Bulletin Board and an interview with Congresswoman Millicent Fenwick in June 1978. (TR 474; Pillar Ex. 7, p. 8)

Bodman's letters were written at the request of Lawrence J. Tighe, Jr., RNJ's President. (TR 1587, 1591) Tighe suggested language to be used in both letters. (TR 1587, 1591-92) However, Tighe did not suggest that Bodman specifically request air-time on the station in either letter. (TR 1588, 1592) Tighe confirmed that he never asked Bodman to try to place any spots or programs on Station WAWZ-FM for the Courter for Congress Committee.[33] (TR 1592-93)

78. The October 22, 1980 letter requested a prompt response because the election was only two weeks away. (RNJ Ex. 35, p. 82) Pillar received the letter on October 23, 1980. (RNJ Ex. 35, p. 84) Pearsall did not answer the letter because it came "fairly close before the election" and Station WAWZ-FM had no plans for political coverage of that election and the station had no rate card for political advertising rates. (TR 1519)[34]

79. As noted, *supra*, the Kean and Courter inquiries were made at the request of Lawrence J. Tighe, and RNJ principal. (TR 1586, 1591) Tighe wanted to establish that Station WAWZ-FM was not fulfilling its obligations to provide political coverage. (TR 1586-87) As a regular listener, he had not heard political coverage on Station WAWZ-FM. (RNJ Ex. 35, pp. 1-2; TR 1587) Tighe suggested language for, but did not write, the letters. (TR 1587, 1591-92)

(3) Public Affairs Programming

80. Station WAWZ-FM broadcast locally-produced public affairs programs on eight occasions during the license period, for a total of 227 minutes of programming.[35] (Pillar Ex. 7, pp. 8-9; TR 439)

81. However, Station WAWZ-FM broadcast a number of recorded public affairs programs which it submits met the ascertained needs of the service area. Those programs are the following:

(a) *"Rutgers University Forum"* was a public affairs program originating at the University, New Brunswick, New Jersey, which is located less than ten miles from the Station WAWZ-FM studios at Zarephath. The program was moderated by staff members of the University's Department of Journalism & Urban Communications. Throughout the license term, the program was scheduled for Saturday mornings on Station WAWZ-FM. Additionally, for two years of the license term, the program was repeated during the following week, usually on Monday afternoons, and for six months a third broadcast on Saturday afternoons was scheduled.[36] The program was 25-30 minutes in length. (Pillar Ex. 7. pp. 3-4) During the license term, the program typically featured a panel of interviewers, sometimes including reporters from newspapers in Station WAWZ-FM's service area, such as *The Newark Star Ledger*, *The Trenton Times*, *The New Brunswick Home News*, and *The Courier News.*[37] (Pillar Ex. 7, pp. 27, 29) Guests were interviewed regarding topics of concern to New Jersey residents, including, as detailed, *infra*, issues that Station WAWZ-FM's ascertainment surveys identified as significant problems and needs.

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[33] Tighe did not know whether the letter was cleared by Congressman Courter. Tighe had not suggested to Bodman that he should get Congressman Courter's approval before the letter was sent. (TR 1595)

[34] Pearsall did not bring the Courter letter to the attention of Rev. Crawford. (TR 547)

[35] Two of the 10 locally produced programs listed by Pillar were not, in fact, produced by Station WAWZ-FM. The American Chemical Society produced one of the programs. Pillar's Cincinnati station produced the other program. (TR 412-13, 588, 602; Pillar Ex. 7, pp. 8-9) During the license period, Station WAWZ-FM broadcast four local public affairs programs (105 minutes) in 1978, two (52 minutes) in 1979, one (55 minutes) in 1980 and one (15 minutes) in 1981. No locally produced programs were broadcast during the days comprising the composite weeks. (RNJ Ex. 13, pp. 1-3)

32. The problems and needs and the dates they were addressed on the Rutgers University Forum are as follows (Pillar Ex. 7, pp. 24-55):[38]

Taxes/Inflation/Better Government - 5/30/78 "A look at the Senatorial Primary;" 9/26/78, Bi-partisan discussion of legislative activity; 10/10/78, proposed civil service legislation; 10/31/78, U.S. Senate election; 1/9/79, Problems of New Jersey's smaller municipalities; 2/28/79, Essex County new form of government; 3/6/79, legislators discussion re assembly; 7/4/79, 7/11/79, 7/18/79, 7/25/79, 8/1/79, 8/8/79, 8/15/79, 8/22/79, 8/29/79, nine part series on political science research; 10/16/79 - Democratic prospects re election; 10/23/69, Republican prospects re election; 12/11/79, "The Suburban Caucus: A New Voice In Congress; 2/26/80, New Jersey legislative budgetary problems; 4/1/80, Casino legislation and legislative ethics; 4/29/80, Consumer protection; 6/10/80, bond issues; 6/17/80 - 9/2/80, 12 part series re women in New Jersey politics; 11/11/80, presidential and congressional elections impact on foreign and domestic policies; 1/20/81, consumer loan interest rates; 2/3/81, proposed state budget; 2/10/81, effect of state budget on counties; 3/10/81, primary election reform; 4/21/81, issues facing New Jersey; 5/26/81, New Jersey Gubernatorial primary election.[39]

Aged/Housing/Urban - 11/21/78, New Jersey civil rights problems; 8/11/79, urban policy research; 2/19/80, nursing care for elderly; 5/20/80, effect of Cuban refugees on programs and housing.

Education/Culture/Communications - 11/14/78, proposed State University tuition increases; 11/28/78, basic skills test results; 2/21/79, tuition hikes; 3/27/79, pupil testing, teacher evaluation and violence in schools; 5/2/79, state-wide public TV network; 9/12/79, primary and secondary education; 10/30/79, proposed higher education bond issue; 11/20/79, education/legislation; 3/25/80, budget problems, in higher education; 4/8/80, mandatory sex education, teachers' strikes; 5/6/80, threatened discontinuance of state funding for NJPTV; 10/7/80, current issues in New Jersey education: 11/4/80, poll re citizens attitudes and test of NJ television station; 4/14/81, Rutgers University budget; 5/19/81, New Jersey Cable Industry.

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[36] During the composite week the program was broadcast at 6:35 a.m. on Saturday and 1:30 p.m. on Monday. (RNJ Ex. 13, pp. 2-3) The tape was aired, upon receipt, without monitoring it. (TR 443-44)

[37] *The Courier News* is a daily newspaper published in Bridgewater and circulated throughout Somerset County. (Pillar Ex. 63, p. 1)

[38] Understandably, some of the programs dealt with more than one problem or the problems overlapped. As a result, some programs are listed more than once.

[39] Governor Brendon Byrne was interviewed on 1/30/79, 1/29/80 and 6/13/81. Senator Harrison A. Williams, Jr. was interviewed on 6/6/79. Also, on 4/18/79, Secretary of State Donald Lane was interviewed re efforts to improve voter turnout in primaries and elections. On 2/24/81, Lauren Seldon, Executive Director of the New Jersey Chapter of the American Civil Liberties Union was interviewed as to the effect of President Reagan's election on Civil liberties issues.

Crime/Law and Order/Prison Reform - 10/3/78, prison construction needs; 4/4/79, juvenile corrections; 6/27/79, New Jersey judicial system; 9/5/79, casino gambling; 10/2/79, enforcement of N.J. prisons; 3/11/80, casino gambling; 3/18/80, women in State Police; 9/30/80, victims of violent crime; 10/29/80, upcoming corrections bond issue; 12/2/80, state police in inner cities; 12/9/80, casino licensing procedures; 3/24/81, alternatives to incarceration.

Mass Transportation/Traffic/Parking - 9/9/78, increases in commuter rail and bus fares; 5/16/79, proposed state take-over of buses; 5/23/79, efforts to attract tourists; 10/9/79, state acquisition of bus lines; 1/8/80, auto insurance legislation; 5/27/80, tourism, future of Atlantic City; 10/21/80, state takeover of Transport of N.J.; 1/27/81, auto insurance reform; 3/31/81, fare hikes in mass transportation; 5/12/81, motor vehicle inspections.

Employment/Economy - 11/7/78, N.J. economic outlooks; 1/2/79, outlook for N.J. business; 3/20/78, mortgage money market; 11/16/79, N.J. economic outlook; 1/15/80, mortgage rates and interest on checking accounts; 4/22/80, mid-year N.J. economic outlook; 5/5/81, Governor's Economic Policy.

Health/Welfare/Drugs/Alcohol - 12/5/78, need for additional services for the mentally retarded and mentally ill; 12/12/78, proposed physician's assistant legislation in New Jersey; 2/14/79, deregulation of the alcohol beverage industry and the Resorts International Casino hearings; 5/9/79, alcoholism among teenagers and women; 8/15/79, alcohol research; 12/4/79, new regulations for hospital rates; 4/15/80, cut-back in Human Services funding; food poisoning incidents at Marlboro State Hospital, 6/6/81, nursing home fires, effect on Atlantic City, health care by casinos; 1/13/81, threatened cutbacks in Medicaid; 3/3/81, nursing home fires in New Jersey; 3/17/81, plans to alleviate hunger and malnutrition among New Jersey's poor.

Pollution/Sewerage/Energy/Environment - 10/24/78, New Jersey's energy needs for the winter; 2/7/79, proposed reorganization of the Public Utilities Commission and the State Energy Department; 3/13/79, Pinelands land use controversy and farmland preservation; 4/11/79, gas supply in New Jersey and the future of nuclear power in the state; 4/25/79, chemical and solid waste disposal in New Jersey and the nuclear power question; 6/20/79, gas supplies and pricing policy at the federal level; 7/79, research at Rutgers University in microbiology, environmental studies, and biochemistry (three programs, part of a nine-program series); 9/19/79, New Jersey energy needs in the near future; 11/13/79, toxic wastes in New Jersey; 1/22/80, new toxic waste dumping act; 2/5/80, energy outlook for New Jersey; 5/13/80, grant of requested rate increase to New Jersey Central Power and Light; 9/9/80, role of the office of the public advocate as a representative of citizens against public agencies; 9/16/80, the fight against illegal dumping and disposal of toxic waste; 9/23/80, water shortage in Northern New Jersey and the need for the Environmental Protection Bond Issue; 10/14/80, energy supply for upcoming winter; 11/18/80, colloquium on energy, including a call for national energy conservation programs; 11/25/80, water rationing in Northern New Jersey; 2/17/81, PSE&G proposed rate hike, and the effect of Three Mile Island incident on electric bills; 4/28/81, toxic waste and dumping controls.

(b) UPI Roundtable[40]

"*UPI Roundtable*" was produced by United Press International and distributed through its audio service. It was a weekly 30-minute program, usually focusing on a single topic. The program was broadcast Saturday mornings on Station WAWZ-FM. For approximately two years of the license term, the program also was broadcast on Friday afternoons. During the license term, the program featured interviews with newsmakers, panel discussions among reporters and experts, and extended analytic news reports on significant events. (Pillar Ex. 7, pp. 4-5, 56-67)

83. A number of the "UPI Roundtable" programs addressed significant problems and needs ascertained in Station WAWZ-FM's community leader consultations. The following are several examples (Pillar Ex. 7, pp. 56-67):

Taxes/Inflation/Better Government - 6/16/78, taxes and Proposition 13; 1/19/79, civil service reform; 4/6/69, interview of Chief White House Anti-Inflation Coordinator; 7/20/79, the government in transition; 4/4/80, discussion re taxes; 8/8/80, the drive for an "open" Democratic Convention.

Aged/Housing/Urban - 10/28/79, "Preparing for Retirement;" 10/24/80, tax shelters and retirement plans; 10/3/80, health care for the elderly.

Education/Culture/Communication - 6/30/78, discussion of the *Bakke* decision by the U.S. Supreme Court; 2/8/81, interview of the Secretary of Education.

Crime/Law and Order/Prison Reform - 5/2/80, Judge Sirica reviewed the Watergate story; 5/23/80, G. Gordon Liddy interviewed; 7/18/80, discussion re gun control; 12/21/79, interview with authors of *The Brethren*, discussed their study of the United States Supreme Court.

Mass Transportation/Traffic/Parking - 4/24/81, interview of Transportation Secretary.

Employment/Economy - 4/20/79, discussion re the downturn in the economy; 8/17/79, discussion of economy by members of the Committee For Economic Development; 8/24/79, financial planning and security for women; 12/14/79, the problems of small businesses in a faltering economy; 1/4/80, the state of the U.S. economy; 3/6/81, the economy and the construction industry; 3/20/81, Chairman of the President's Council of Economic Advisors interviewed; 2/1/81, the U.S. steel industry.

Health/Welfare/Drugs/Alcohol - 7/13/79, interview of the author of "Arthritis;" 1/18/80, stress in the workplace; 5/16/80, overcoming stress, tension, worry and fatigue; 5/15/81, interview with Secretary of H. H. S.; 5/29/81, the infant formula controversy.

Pollution/Sewerage/Energy/Environment 3/30/79, hazardous waste disposal; 4/6/79, a look at the Three Mile Island nuclear reactor breakdown; 5/5/79, rising gasoline prices; 6/15/79, interview with Energy Department Secretary and oil industry spokesman; 7/27/79, alternative energy development projects; 8/10/79, toxic wastes; 11/2/79, the Three Mile Island accident report; 12/12/80, discussion re "Energy and Security."

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[40] UPI Roundtable was sent to Station WAWZ-FM by audio feed. The station recorded it for later broadcast, but did not monitor the program before broadcasting it. (TR 443) During the composite week, Station WAWZ-FM broadcast UPI Roundtable on Saturday at 7:00 a.m. (RNJ Ex. 13, p. 3)

Youth/Family/Divorce, **1/25/80, parents' relationships with their adult children; 8/23/80, interview with the Chariman, White House Conference on Families;[41] 9/5/80, women at work.**

Religious Reawakening/Apathy/Morality, **10/17/82, Rev. Jerry Falwell, leader of the Moral Majority, and others discussed religion and politics.**

(c) Keys to Better Living[42]

84. Keys to Better Living was a program series produced by Dr. Richard M. Canfield. Approximately 780 15-minute "Keys to Better Living" programs were broadcast by Station WAWZ-FM during the license term.[43] (Pillar Ex. 7, p. 5) Primarily, the program addressed such topics as personal development and improved family relationships as viewed from the Christian-Judeo ethic. (TR 398) The broadcasts covered a wide array of personal development topics, including mental health, family relationships and divorce, guilt, confidence and security, reading skills, self-improvement, moral and religious reawakening, health and recreation, sexuality, drugs and alcohol, and maturity and responsibility. Other programs addressed special problems faced by young people, the elderly, and the poor. (Pillar Ex. 7, pp. 69-73)

85. Dr. Canfield earned a Bachelor of Science degree from Wheaton College, a Bachelor of Divinity degree from Northern Seminary in Chicago, and completed his graduate work in educational and chemical psychology at the University of Nebraska and Pennsylvania State University. He has served as instituitonal chaplain for the State of Nebraska and on the professional staff of Phil Haven Psychiatric Hospital. He is the founder and director of Keys to Better Living, Inc. and provides counseling daily at the Keys Counseling Center located in Manheim, Pennsylvania. (Pillar Ex. 7, p. 5)

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[41] The "UPI Roundtable" program series included interviews with numerous elected and appointed officials, including Congresswoman Millicent Fenwick (R-N.J.) (Pillar Ex. 7, p. 66) and Senator Bill Bradley (D-N.J.) (Pillar Ex. 7, p. 67); former President Ford, Congressman Toby Moffett, Congressman John Anderson. (Pillar Ex. 7, pp. 63, 64, 65)

[42] RNJ's contention that "Keys to Better Living" and "The Word and The World" were improperly classified as public affairs programs is rejected. Wide discretion is accorded licensees in program classifications. *United Broadcasting Co.* (KASY-FM), *93* FCC 2d *482*, 53 RR 2d 57, 72-73 (1983); *Lance Communications, Inc.*, 57 FCC 2d 1234, 1244 (1976). It is ruled that Pillar reasonably exercised its discretion in classifying these two programs as public affairs programs. The fact that these programs dealt with contemporary issues such as family, divorce, youth and other problems, from a moral or religious perspective does not preclude their being classified as public affairs programs.

[43] During the composite week it was broadcast Monday through Friday at 11:05 a.m. It was produced in Manheim, Pennsylvania. (TR 458) Station WAWZ-FM received compensation for broadcasting the program, which was not monitored in advance by Station WAWZ-FM. (TR 446)

(d) The Word and The World

86. The Word and The World was produced by David M. Virkler of Towaco, New Jersey. The program featured interviews, and personal commentary from a Christian and Biblical perspective, regarding current events and topics affecting Americans. (TR 451-53, 1128, 1528) The program emphasized family life, youth development and morality, including morality in government. (Pillar Ex. 7, p. 6) Among the issues treated on "The Word and The World" during the license term were the sale of arms to Israel, the crisis in Iran, the Camp David peace talks, teenage suicide, problems in the public school system, patriotism, crime, chemical warfare in Afghanistan, the energy crisis and civil unrest. Moreover, the program presented interviews with athletic figures, entertainers and religious figures, sharing their perspectives on Christian lifestyles. The 15-minute program was aired twice each Sunday throughout the license term.[44] (Pillar Ex. 7, pp. 6, 75-76)

(e) The Added Years

87. The Added Years was a 15-minute program featuring discussions on the problems faced by senior citizens, and offering advice to senior citizens on topics such as nutrition and health care.[45] State and county specialists on aging frequently were called upon to describe services available to the elderly. During the license term, program topics included diseases most common to the elderly, diets for the aged, financial issues related to preparing for retirement (i.e., preparing a will, etc.) and elderly persons working with youth. The program, produced by the Division on Aging of the New Jersey Department of Community Affairs, was aired on Wednesday afternoons for approximately two years of the license term. (Pillar Ex. 7, pp. 7-8)[46]

(f) Focus on Health

88. Focus on Health featured discussions of current health and medical topics by experts in the field.[47] (Pillar Ex. 7, pp. 77-101) During the license term, "Focus on Health" presented discussions on such topics as diet and nutrition, accidental drug addiction, detecting learning disabilities in children, juvenile diabetes, keeping fit on the job, hypertension, the role of the family doctor, controlling muscle tension and family

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[44] During the composite week it was broadcast on Sunday at 7:05 a.m. and 2:05 p.m. (RNJ Ex. 12, pp. 3-4) Pillar received compensation for broadcasting the program. (TR 446-47)

[45] The problems of the aged were identified in Station WAWZ-FM ascertainment surveys as significant throughout the license term. (Pillar Ex. 9, pp. 15-19)

[46] During the composite week, it was broadcast on Wednesday at 1:40 p.m. (RNJ Ex. 13, p. 2)

[47] During the two years of the license term, Station WAWZ-FM's ascertainment surveys identified the topic of health as a significant problem and need. (Pillar Ex. 9, pp. 17, 19)

needs of chronically ill children. (Pillar Ex. 7, pp. 79, 81, 85, 90, 95, 97, 99) "Focus on Health" was produced by the Forest Hospital Foundation of Des Plaines, Illinois. It was broadcast for 25 minutes on Tuesday afternoons for approximately two years of the license period.[48] (Pillar Ex. 7, pp. 6-7)

(g) Conversations in Chicago

89. Conversations In Chicago was produced by the University of Chicago, featured discussions of current events and issues by experts in various fields. (Pillar Ex. 7, pp. 102-47) The program, 25 to 30 minutes in length was broadcast once a week for nearly all the license term.[49] (Pillar Ex. 7, p. 7) The series included programs addressing problems and needs identified in Station WAWZ-FM's ascertainment interviews with community leaders. (Pillar Ex. 7, pp. 102-47)

90. The program also dealt with elections, polls and coverage. (Pillar Ex. 7, pp. 108, 119, 128, 137, and 147)

91. This series dealt with such problems as taxes, inflation and better government. (Pillar Ex. 7, pp. 108, 119, 128, 129, 137, 143, 147); the aged, housing and urban problems (*Id.*, p.112); education and communication (*Id.*, 106); crime/law and order/prison reform (*Id.*, p. 120, 141, 142); mass transportation (*Id.*, pp. 109-10); employment and the economy (*Id.*, pp. 105, 108, 117, 125); health, welfare, drugs and alcohol (*Id.*, pp. 111, 113, 119, 121, 140, 141, 144); pollution, sewerage, energy and the environment (*Id.* pp. 115, 117); youth, family and divorce (*Id.*, pp. 107, 114, 120, 123, 142); religious reawakening, apathy and morality (*Id.*, pp. 115, 122, 133).

(h) Other Public Affairs Programs

92. At times throughout the license period, Station WAWZ-FM aired the following local public affairs programs that were not part of a regularly scheduled series (Pillar Ex. 7, pp. 8-9):

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[48] During the composite week it was broadcast on Tuesday at 1:32 p.m. (RNJ Ex. 13, p. 2)

[49] During the composite week it was broadcast on Thursday and Friday at 1:29 p.m. (RNJ Ex. 13, p. 3)

PROGRAM	*DATE (and air time)*	*DURATION (Minutes)*
Interview with Congresswoman Millicent Fenwick (R-New Jersey). Topic: Crime and Crowding in the Cities	June 22, 1978 1:05 p.m.	28
Discussions of the work of Big Brothers and Big Sisters of Somerset County.	August 16, 1978 1:05 p.m.	22
Broadcast of speech made at a meeting at the Environmental Education Center, Basking Ridge, New Jersey	September 9, 1978 6:32 a.m.	30
Interview with Elizabeth T. Lyons, regarding job readiness workshops for women	September 26, 1978 1:05	25
Interview with two candidates for local office	October 25, 1979 1:30 p.m.	25
Interview with two candidates for local office	November 1, 1979	27
Discussion of the work of Big Brothers and Big Sisters of Somerset County	August 9, 1980 6:15 p.m.	15
Interview with Joe Schultz youth counselor, regarding parent-child relationships, drugs, divorce and peer pressures	May 19, 1981 4:05 p.m.	55

(i) Other Programs, Exclusive of Entertainment and Sports

(1) Public Service Announcements

93. During the license term, Station WAWZ-FM aired over 12,000 public service announcements for more than 700 local, regional, state and national organizations, including a wide array of civic, consumer, educational, health, religious and youth groups and associations. A large number of these announcements were for churches and other religious organizations in Station WAWZ-FM's service area.[50] (Pillar Ex. 7, pp. 148-180)

(2) Community Bulletin Board

94. Community Bulletin Board was produced by Station WAWZ-FM, as part of the station's schedule throughout the license term. The program, prepared and broadcast by Victor Capolunghi, included an-

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[50] The public service announcements receiving the most air time were those that were sent to the station taped and ready-made for broadcasting. (Pillar Ex. 7, pp. 149-150)

nouncements regarding cultural, civic and religious activities throughout Station WAWZ-FM's service area. (TR 485, 1450)[51] In addition, news releases from various organizations, such as educational institutions and government agencies, were included in the broadcast. Capolunghi listed more than 160 institutions and organizations he recalled as having had announcements on "Community Bulletin Board" during the license term. Many of those organizations had dozens of announcements on the program during that period. (Pillar Ex. 62, pp. 1-2, 4-12) Through these announcements, the station furnished its listeners with information concerning cultural opportunities and events in the community.

95. During two years of the license term, "Community Bulletin Board" was aired for ten minutes Monday through Friday, usually in the early evening hours. In 1980, the program was broadcast for 15 minutes on Mondays, Wednesdays, and Fridays.[52] (Pillar Ex. 7, pp. 9-10) Announcements that weren't included in the program due to time limitations were made available to the station's announcers to be read as public service announcements throughout the day. (TR 1468) No announcement was ever rejected for broadcast because of its content. (TR 1467)

96. It was very possible that during the license term a listener would hear the same Community Bulletin Board announcement each time it was broadcast during a particular week. Capolunghi would prepare one or two tapes per week for rebroadcast. (TR 417-18) Listeners and organizations were asked to send announcements for broadcast on Community Bulletin Board at least two weeks in advance of the event. (TR 226, 418)

(3) Children's Programs

97. During the license period, Station WAWZ-FM broadcast nine program series designed for children. The series were of two basic types: those in which the children themselves participated and those that were directed toward the special needs and interests of the young. This programming was designed to entertain, educate and instruct children. Discussed, *intra*, are Station WAWZ-FM's children's programs broadcast during the license term. (Pillar Ex. 7, pp. 10-13)

> *Children's Bible Story* was and is a program hosted by Bishop Lawrence, President of Pillar. The program originated either in the Station WAWZ-FM studios at Zarephath or at other locations where it was taped for later broadcast. The 25-minute program, which has been on Station WAWZ-FM for 20 years, was carried throughout the license term on Saturday mornings. During the license term, the program frequently was recorded in a Bound Brook, New Jersey school. Children from, among other communities, Zarephath, Bound Brook, New Brunswick, Piscataway,

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[51] Some of Pillar's public witnesses recalled that the program was, to a great extent, a report of upcoming church events. (TR 821, 1045, 1071)

[52] During the composite week the program was broadcast three times for a total of 35 minutes. (RNJ Ex. 12, pp. 8, 16, 22)

Somerset, Martinsville, Middlesex, Hillsborough, Somerville, Neshanic, Manville, and Sussex participated. The program consisted of interviews with various children, ages two to fifteen years. Interview topics included health, community affairs, floods, storms, problems children have with parents, school activities, sports and future careers. Following the interview, Bishop Lawrence read a Bible story, interspersed with questions to the children asking their opinion on the conduct of the characters in the story. (Pillar Ex. 7, pp. 10-11, 187-202)

Here's How, produced by the Child Evangelism Fellowship, was a 15-minute weekly program designed to provide practical ideas to adults working with children in the church, the community and the home. The program was carried, on a sustaining basis, throughout most of the license term. (Pillar Ex. 7, pp. 11, 182-83)

Back to the Bible Youth Broadcast, directed especially toward young teens, was intended to provide a Biblical foundation and direction to their lives, to meet the special needs of teens by answering and dealing realistically with their problems. "Back to the Bible Youth Broadcast" consisted of a half-hour of music, drama and message, in which the young people participated. Topics included guidelines for love and dating, how to make and keep friends and how to get along with parents. The 30-minute program was carried on a sustaining basis during 29 weeks of the last year of the license term.

Children's Bible Club was a 15-minute weekly program hosted by Mrs. Carolyn Hobbs (Aunt Carolyn) and produced at the Santa Rosa Christian School in Milton, Florida. The program consisted of signing by the children at the school and a dramatic reading of a Bible story by Mrs. Hobbs. The program was carried on all but six Mondays throughout the license term. (Pillar Ex. 7, pp. 12, 182)

Your Story Hour, using a cast of professional actors, presented weekly dramatized stories based on the Bible, history, literature and every-day life. The 30-minute program was carried by Station WAWZ-FM, on a sustaining basis, nearly every week of the license term. (Pillar Ex. 7, p. 12)

Children's Bible Hour, a 30-minute weekly program, planned for and produced with children, featured singing by the children and a dramatized story. The program, broadcast nearly every week of the license term, was carried on a sustaining basis by Station WAWZ-FM. (Pillar Ex. 7, p. 12)

Gateway Worldwide Children's Broadcast was produced at the Gateway Christian School in Hackensack, New Jersey. The purpose of the broadcast was to acquaint the listeners with the missionary endeavors carried on by the School in Korea and South America. The speaker told of the work of the school at home and abroad and gave short family-oriented messages based on Old and New Testament themes. The program was carried for 31 weeks during the first year of the license term. (Pillar Ex. 7, pp. 12-13, 183)

Ranger Bill was produced at the studios of Moody Bible Institute in Chicago, Illinois. The weekly 30-minute program consisted of a dramatized story featuring "Ranger Bill", a forest service ranger in the northwestern United States. "Ranger Bill" brought order and justice out of many chaotic and dangerous situations. Basic ethical truths were taught through his judicious actions, and the children were taught the virtues of being honest. "Ranger Bill" was carried by Station WAWZ-FM on a sustaining basis, for 29 weeks of the last year of the license term. (Pillar Ex. 7, pp. 13, 183)

Music for Children. During approximately the first year and a half of the license term, Station WAWZ-FM featured a program of youth-oriented sacred music from 6:20 p.m. to 6:35 p.m. on Mondays, Wednesdays and Fridays, following the 15-minute children's programs broadcast beginning at 6:05 p.m. on those days.[53]

(4) Other Religious Programs Broadcast By Station WAWZ-FM[54]

Evening Prayer Fellowship was a phone-in program intended to provide its listeners with a forum to discuss their problems and spiritual needs. Essentially, the program offered its listeners a "hot-line" to talk about their problems and concerns and to receive advice. The caller's voice, however, was not heard on the air. The program was hosted, on a rotating basis, by pastors representing various denominations and churches within Station WAWZ-FM's listening area, as well as Pillar pastors. The program hosts offered extemporaneous prayers over the air addressing the problems called-in by the listeners. This program, and "Community Request Hymn Time" were the most popular programs on the station based on the results of a survey of a survey of over 1,000 listeners. Throughout the license term, the program was broadcast at 9:00 p.m. for a half-hour, seven days a week. (Pillar Ex. 7, pp. 14, 204-05)

Community Request Hymn Time included participation by Station WAWZ-FM's audience by allowing listeners to call the station to request that particular hymns be played. The program was intended to provide a direct and immediate response to the local audience. As a religious broadcaster, Pillar is of the view that the use of hymns and gospel songs is in itself an important ministry. Throughout the license period, the program was broadcast for 60 minutes beginning at 8:00 p.m., seven days a week. (Pillar Ex. 7 pp. 13-14)

Pillar of Fire Pulpit, produced by the Pillar staff, presented Bible-centered devotionals. The various speakers, through sermons and Bible lessons, addressed societal problems, including the deterioration of the family, crime, drug and alcohol abuse, pornography, child abuse, health, poverty, integrity and honesty in government, religious and moral ambivalence, and apathy. The program varied in length from 15 to 30 minutes and was aired Sunday through Friday at 8:05 a.m., and Monday through Friday at 7:00 p.m. (Pillar Ex. 7, p. 15)

Sermon Lecture Series featured a series of recorded sermons prepared by now-deceased Bishop A. K. White, who played a role in the establishment of Stations WAWZ(AM) and WAWZ-FM. During the license term, this half-hour program was broadcast Sunday mornings at 8:30 a.m. It was broadcast 39 Sundays in the first year of the license term and 52 Sundays in each of the second and third years of the license term. (Pillar Ex. 7, p. 15)

Morning Worship Service was broadcast live from Pillar of Fire Church each Sunday morning at 11:00 a.m. (*Id.*)

Evening Worship Service, a youth-oriented devotional, was broadcast live each Sunday evening at 7:00 p.m. The sermon from the service was rebroadcast the following Sunday at 3:05 p.m. on the "Pillar of Fire Hour." (*Id.*)

Sunrise Worship, usually 30 minutes in length, aired each weekday morning at 7:30 a.m. It featured a variety of speakers. The program was produced twice a week by Pillar. On Tuesdays the chapel service of the Pillar Church was broadcast live. On

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[53] On Tuesdays and Thursdays, the children's programs broadcast at 6.05 p.m. were 30 minutes in length. (Pillar Ex. 7, pp. 13. 183)

[54] Other religious stations providing programs to Station WAWZ-FM's 1.0 mV/m service area were Stations WFME(FM), Newark, New Jersey; and WWDJ(FM), Hackensack, New Jersey. (TR 804, 887, 911, 986, 1001, 1224; Joint Ex. 1, Fig. 1) Another FM religious station broadcast from Trenton, New Jersey. (TR 1120) These stations covered parts of the Station WAWZ-FM service area. (Joint Ex. 1, Figs. 8 and 12)

Thursdays, Pillar presented a Bible discussion. The schedule for the rest of the week was as follows: on Wednesdays Dr. Henry Heaps, a Presbyterian pastor from Dunellen, New Jersey, presented a recorded devotional service; on Monday and Fridays, Dr. David Seamands, a Methodist pastor and a counselor, presented "Wilmore Pulpit," a recorded program. (Pillar Ex. 7, p. 15-16)

Searchlight was a religious ministry directed to persons in prison. It was produced at Station WAWZ-FM and hosted by Dr. Robert Leone, a Roman Catholic involved in the Kairos program to bring Christian teaching to prisoners. Leone's guests on the program discussed how the lives of prisoners were being changed through various prison ministries throughout New Jersey. Guests on the programs during the license term included:

Joseph Ravenell, Chaplain, Trenton State Prison;

John Kelly, Founder, Bridge Ministries, Delanco, New Jersey;

Leroy Holmes, ex-convict, pastor of a Linden, New Jersey church;

Rev. Ray DuBois, Chaplain, Yardville Correctional Center;

Rev. Renato Saudelli, a Roman Catholic priest, Consolata Mission Center, Somerset, New Jersey;

Volunteer group from Rahway State Prison;

Deacon Ed Jennings, a Roman Catholic, Springlake, New Jersey;

Teachers from various local area schools;

Vincent Maltese, ex-inmate, Leesburg Prison;

Gene Iannacelli, ex-inmate, Leesburg Prison.

Searchlight was broadcast Saturday mornings at 11:05 a.m. throughout the license term. The program was 15 minutes in length during the first year of the license term, and 25 minutes in the second and third years. (Pillar Ex. 7, pp. 16-17)

98. During the license term, Station WAWZ-FM provided technical assistance to many local churches interested in broadcasting religious programs on the station. The area churches that broadcast programs on Station WAWZ-FM included (Pillar Ex. 7, pp. 17-20):

First Presbyterian Church, Dunellen New Jersey. Pastor Henry Heaps presented a 30-minute program aired Wednesdays on the series, "Sunrise Worship." This program included a sermon and often singing by the church choir. The program was produced specifically for Station WAWZ-FM.

Calvary Baptist Church, East Millstone, New Jersey. "Echoes from Calvary" was produced at Calvary Baptist Church specifically for Station WAWZ-FM. Pastor Gary Burgess was the speaker on the program. During the first year of the license term, the weekly 15-minute program was broadcast for 39 weeks. The program was scheduled for each week of the second and third year of the license term.

Bunker Hill Lutheran Brethren Church, Griggstown, New Jersey. "Moments of Faith" was produced by the Bunker Hill Lutheran Brethren Church of Griggstown, New Jersey. The program consisted of a devotional talk by the pastor, Robert Sletta, and music. The 15-minute weekly program was broadcast Sundays during the last year of the license term.

Tabernacle Baptist Church, South River, New Jersey. Tabernacle Baptist Church produced the "Gospel Hour." The speaker was the church's pastor, Donald Balfour.

The weekly 15-minute program was produced for broadcast on Station WAWZ-FM and was scheduled for broadcast on Sundays throughout the license term.

Second Presbyterian Church, Elizabeth, New Jersey. The program "Spiritual Healing" originated from the Second Presbyterian Church. The speaker was Rev. Charles W. Fitz, pastor of the church, and a chaplain in the International Order of St. Luke the Physician, a world-wide organization which deals especially with the Biblical concept of Divine healing for the body. The 15-minute program was broadcast five days a week. Rev. Fitz discussed various aspects of "spiritual healing" on each program, explaining and describing the Bible's teachings concerning Divine healing. The program was produced specifically for broadcast on Station WAWZ-FM.

Fellowship Church, Phillipsburg, New Jersey. Rev. Tom Smith is the pastor of the Fellowship Church. Prior to entering the ministry, Rev. Smith was a New Jersey State Policeman for many years. His experience in law enforcement formed the basis for his perspectives on various human problems. His 30-minute program, "Fellowship Echoes," was produced for Station WAWZ-FM and was broadcast Sundays at 9:30 p.m. starting in May, 1980 through the end of the license term.

Old First Church, Presbyterian, Newark, New Jersey. "Worship at Old First" was aired Sunday mornings throughout the license term. The program featured the church's complete worship service. Frequently, Princeton Theological Seminary provided speakers for the pulpit.

New Durham Chapel, Piscataway, New Jersey. Pastor Ted Cowan was the speaker for "New Durham Chapel Echoes." Produced for broadcast on Station WAWZ-FM, the 15-minute program was scheduled for Sunday mornings throughout the last two years of the license term. The program consisted of commentary by Pastor Cowan, a Bible lesson or devotional talk, and singing by the choir of the church.

Presbyterian Church of America, Irvington, New Jersey. "Winds of the Northeast" was a 15-minute daily program produced for broadcast on Station WAWZ-FM by Rev. Bill Iverson, a Presbyterian minister affiliated with the Regional Seminary of the Northeast in Irvington. Many of his messages on the program were directed to the teenage listening audience. The program series began in the last few months of the license term.

Sixth Reformed Church, Paterson, New Jersey. Pastor Charles W. Krahe was the speaker on "Faith of Our Fathers." The 30-minute weekly program was broadcast Sunday beginning in the later portion of the first year of the license term and through the end of the license term.

99. Station WAWZ-FM additionally aired a variety of non-local religious programs. During various portions of the license term, 36 syndicated religious program series were broadcast on the station.[55] For example, "Chapel of the Air" treated subjects such as divorce, the decline in public morality, the breakdown of the family and child-parent relationships. "God's News Behind the News" featured discussions, from a scriptural viewpoint, of contemporary events and trends. "The Family Altar" frequently featured discussions of contemporary problems–particularly those relating to youth, such as crime and drug abuse.

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[55] Pillar received compensation for broadcasting most of these programs, as indicated by the entry "commercial matter" beside many of the programs in Station WAWZ-FM's composite week logs. (RNJ Ex. 12, pp. 2-26)

Among the other program titles were: "Telling the Truth," "Thru The Bible," "Radio Bible Class," "The Light and Life Hours," "Moments With The Book," "The Voice of Hope," "Sar Shalom," "World Religious News," "World Literature Crusade," "The Bible for You," "Your Time," and the "Morning Chapel Hour." These programs represented a wide array of Protestant church affiliations. (Pillar Ex. 7, pp. 20-21, 206-16)

(j) Entertainment Programming

100. In addition to its non-entertainment programming Station WAWZ-FM's schedule included programs featuring recorded classical and inspirational music. Most of these programs were produced by the staff of Station WAWZ-FM. For example, the "Evening Serenade," broadcast at approximately 6:30 p.m. each evening, featured light classical music. "Symphony of Praise," broadcast from 2:30 to 4:00 p.m., featured easy listening sacred music, interspersed with news and weather. In addition, Station WAWZ-FM broadcast 30-minute recorded concerts throughout the license term on Saturday evenings. The concerts featured the late Bishop A. K. White of Pillar playing the organ, frequently accompanied by other instruments. (Pillar Ex. 7, pp. 21-22) Local talent was featured in some Station WAWZ-FM programming. (TR 377)

101. Another entertainment program, "The DeKoven Concert," was produced by Seymour DeKoven of Jamesburg, New Jersey. The program included rarely heard selections of music from the baroque and rococo periods. In the program, DeKoven offered commentary on the music and its composers. During the first two years of the license term, the 60-minute program was aired Wednesday afternoons at 3:00 p.m. In the last year of the license term, it was broadcast on Saturday afternoons. (Pillar Ex. 7, p. 22)

(k) Policy and Practice of Station WAWZ-FM re Christian Scientists, Catholics, Jews and Mormons

102. "The Discipline" of the Pillar of Fire Church defines the beliefs of the Church. The Discipline governs the activities and states the purpose of the Church. It sets forth the belief in the fundamental doctrine of the orthodox Christian Protestant denominations. (Pillar Ex. 9, p. 4) This document makes reference to the fact that there are "many false teachers and many false movements," such as Christian Science and Mormonism. The Discipline expresses a belief in the "Pre-Millenial Coming of the Lord, and the Restoration of the Jews." It makes reference to the "Popish doctrine" concerning purgatory, pardon, worshiping, adoration and the invocation of saints as repugnant to the "Word of God." (Pillar Ex. 9, pp. 5-6)

103. Station WAWZ-FM broadcast several programs that sought to explain why Jews should accept Jesus and convert to Christianity. (Pillar

Ex. 1, p. 4; TR 156, 361, 1526) The programs were produced by Jewish-Christians, Jews who had accepted Christ as the Messiah and were Christians in both practice and belief. (TR 938, 1086, 1526) Examples of these programs were The Chosen People's News Hour[56], Truth for Israel and Sar Shalom. (TR 938, 1086; Pillar Ex. 7, pp. 208, 210, 212)

104. During the license period Station WAWZ-FM broadcast no programs directed to Jewish persons other than to persuade them to become Christians. (TR 156, 939, 1086) No rabbis appeared on Station WAWZ-FM during the license period. (TR 361, 509) Pillar could cite no religious programs broadcast during the license period that reflected a religious philosophy other than a Christian philosophy.[57]

105. Reverend Lawrence denied that Pillar had a policy of keeping the religious beliefs of Jews off the air during the license term.[58] (TR 373-74) However, Reverend Dallenbach, a member of the Pillar Board of Trustees responsible for insuring Station WAWZ-FM's adherence to Pillar policy, acknowledged that he would not broadcast material he felt was contrary to the "very central thrust of Christianity, that someone not accept Jesus." (Pillar Ex. 6, p. 2; TR 156)

106. Both Dallenbach, Pillar's broadcast policy coordinator, and Pearsall, program director, explained that they would permit a rabbi to express opposition on Station WAWZ-FM to the thrust of the station's Jewish-Christian programming in a program where both points of view would be expressed simultaneously. (TR 157, 1526-27) Rev. Lawrence related his unsuccessful efforts during the license period to have rabbis broadcast.[59] (TR 361-62)

(1) The Purported Request by The World Jewish Broadcasting Network

107. David Field, a resident of New York City, is a long-time friend of Lawrence Tighe, Jr., President of Radio New Jersey[60]. They have known each other since 1970. Field visited Tighe in Hackettstown; helped Tighe install equipment at Radio's Hackettstown station, WRNJ, and worked at the station on a voluntary basis. In 1979, Field learned of Tighe's intention to have Radio file a construction permit application mutually exclusive with Station WAWZ-FM's license renewal application. (TR 1272-75)

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[56] This program included, *inter alia*, discussion of anti-Semitism and current events in the Middle East. (TR 1582)

[57] There were Jewish congregations in Somerset County. (TR 159, 508)

[58] He also denied that there was a policy to keep the religious beliefs of Mormons, Christian Scientists or Catholics off the air, and he emphasized that it was never his intent to do so. (TR 373-74)

[59] Crawford confirmed these efforts and pointed out that rabbis appeared on the station both before and after the license period.

[60] Radio New Jersey is hereinafter referred to as RNJ or Radio.

108. At the request of Tighe, Field wrote four letters to James Pearsall, Program Director of Station WAWZ-FM. (RNJ Exs. 22-26) The first letter, dated January 12, 1981, enclosed a demonstration cassette of a 55-minute program titled "Music Magazine" which was produced by the World Jewish Broadcasting Network. Field's letter stated that he was interested "in purchasing time on WAWZ-FM for the purpose of bringing this program to interested and concerned listeners." The letter also requested information regarding rates and available time periods. (RNJ Ex. 22)

109. Field related that at the end of 1980 or the beginning of 1981, Tighe told Field that he, Tighe, had seen an advertisement in a broadcasting industry magazine for a "Jewish program." (TR 1283) Tighe had Field contact the program producer, the World Jewish Broadcasting Network, to obtain a demonstration tape of the program. (TR 1285; Pillar Ex. 61) Tighe asked Field to send letters to Station WAWZ-FM expressing a purported interest in buying time to broadcast "Music Magazine" on Station WAWZ-FM. Tighe suspected, he told Field, that anyone trying to buy time on Station WAWZ-FM for anything "but a certain kind of program, a certain sect of program," would be turned down. Field spoke with Shimon Herkowitz of World Jewish Broadcasting Network to obtain the tape. He told Herkowitz that Tighe was interested in, perhaps, putting the program on Station WRNJ and that is why Field wanted the program mailed to Tighe. Field knew that the statement was not accurate; Tighe was not interested in airing the program on Station WRNJ. (TR 1285-86) The demonstration tape was mailed by Network to Tighe in early January, 1981. (Pillar Ex. 61) Tighe gave the demonstration tape to Field. Prior to sending the first letter and the tape to Pearsall, Field listened to the program and made a copy of it.[61] The program, Field recalled, was not primarily religious. The music on the program was of a popular nature. He knew, however, that the musical programming of Station WAWZ-FM essentially was religious and inspirational. (TR 1285-86, 1289)

110. Field was not in any way connected with The World Jewish Broadcasting Network and was not authorized by that organization to make any representation regarding the purchase of time on any radio station. Field acknowledged that he had no intention of purchasing time on Station WAWZ-FM for the broadcast of the Music Magazine Program.[62]

111. Since Field had not received a response from Station WAWZ-FM on March 6, 1981, he mailed a second letter to Pearsall in which he stated that he had not received a reply to the first letter. Along with the second

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[61] The transcript of the program is RNJ Ex. 37, pages 4-9.

[62] Field never obtained a sample contract from The World Jewish Broadcasting Network nor a full-length tape of the "Music Magazine" program.

letter, he sent a second copy of the "Music Magazine" demonstration tape. The letter stated, in part, "Again it is a subject very dear to my heart to provide a program of this nature for the enjoyment and enlightenment of my bretheren [sic]. Since your programs appear to be almost 100% religious oriented, I feel confident that yours is the station to approach in order to reach like-minded individuals." (RNJ Ex. 23)

112. Pearsall, on March 9, 1981, responded to Field's March 6 letter thanking Field for taking the time to contact Station WAWZ-FM and returning the cassette of the demonstration program. Pearsall stated that, since the content of the program did not fit the format of Station WAWZ-FM, there would be no chance of the station using it.[63] (RNJ Ex. 24)

113. Field followed up with a letter to Pearsall dated March 19, 1981 in which he stated it was a "great disappointment" for him to learn that "Music Magazine" did not fit the Station WAWZ-FM format, "since I was certain I heard a comparable type of program on your station during the past year or so."[64] (RNJ Ex. 25) Field also admitted that based on his limited exposure to Station WAWZ-FM, the "Music Magazine" would not fit into the station's music format. He acknowledged that Pearsall's statement in that regard was accurate. (TR 1298-99)

114. Field, in his March 19, 1981 letter, asked Pearsall to inform him what his criteria was for the acceptance of programs. Pearsall had not responded by June 15, and Field wrote another letter to Pearsall enclosing his March 19 letter and requesting a response. (RNJ Ex. 26) By letter dated April 18, 1981 Pearsall responded that Station WAWZ-FM was a "Christian station" with its programs and music reflecting that philosophy. (RNJ Ex. 27)

115. Field explained that Tighe originated the idea to send these letters to Station WAWZ-FM. Each of Field's letters to Pearsall was written at Tighe's suggestion. Tighe reviewed at least three of the letters before they were sent and Field promptly gave Tighe the March 9, 1981 from Pearsall. (TR 1299-1301)

(2) Efforts of Father Wieciek to Communicate with Station WAWZ-FM

116. Father Jerry Wieciek is a Roman Catholic priest and the Director of Radio and Television Satellite Operations for the Diocese of Trenton. (TR 1153) The Trenton Diocese included Somerset County until June 1982. (TR 1154) During the license term, Father Wieciek was the Associate

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[63] Pearsall described the music as rock. Station WAWZ-FM did not broadcast rock music. (TR 1525)

[64] Field admitted he had not heard a comparable program on the station. He explained, "Remember, all of these letters are fabrication." (TR 1295)

Director of Electronic Media in the Trenton Diocese's Office of Communications. His job involved contacting the radio and television stations located in the Diocese in an effort to gain access to air time for the Office of Communications' programming and public service announcements. (TR 1154-55)

117. When Father Wieciek first assumed his duties with the Office of Communications in 1977, he consulted a media directory listing all of the broadcast stations within the area. Station WAWZ-FM was included in this list. (TR 1159-60) He sent out introductory letters with a summary of the Office of Communications' available programming and tapes of public service announcements.[65]

118. The stations receiving the tapes were not requested to respond as to whether or not the announcements were used. (TR 1163) However, based upon mail, telephone calls and personal contacts, Father Wieciek concluded that most of the stations within the Diocese were very receptive. (TR 1163-66) According to Father Wieciek, Station WAWZ-FM was the only station from which he heard nothing. (TR 1165-66) Not having heard from Station WAWZ, Father Wieciek attempted several phone calls. Those answering the phones never put him through to anyone in authority, offering various excuses.[66]

119. On July 18, 1980, Father Wieciek sent a letter to the Station WAWZ program director[67] informing him that "[s]ome time ago we mailed a few letters to your station introducing ourselves and our services to you," but that no response had been received. (RNJ Ex. 17; TR 1170) On September 30, 1980, Father Wieciek sent another letter by registered mail to James Pearsall. (RNJ Ex. 18; TR 1170) This letter informed Pearsall that the Office of Communications had many religious and public affairs radio programs available free of charge. It requested a reply. Pearsall responded with a letter dated October 7, 1980, thanking Father Wieciek for writing and stating that at the present time the station had a full complement of public affairs programs but that Father Wieciek's letter would be kept on file for future reference. (RNJ Ex. 19)

120. After receipt of the October 7, 1980 letter, Father Wieciek visited the station. A young man at the station told Father Wieciek he should speak to Pearsall regarding the placement of programming and public service announcements on the station. Father Wieciek was told that

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[65] Father Wieciek explained that he sent out such letters approximately twice a year. (TR 1160-61) Recorded public service announcements were sent once a month, with a covering letter. (TR 1161-64)

[66] He was told "that's not our format" or that there was no one in authority. On one occasion he was told to put his programming on a Philadelphia or New York station. (TR 1161)

[67] The letter was not specifically addressed to James Pearsall, Station WAWZ-FM's program director.

Pearsall would not be at the station until the evening shift. Two attempts to reach Pearsall by phone later that day were unsuccessful. First he was told that Pearsall was on the air and could not be disturbed until the evening shift was over. Later he was told that Pearsall had gone home. (TR 1167-69) Although Father Wieciek left his name and home and office phone numbers, no one at Station WAWZ-FM contacted him. (TR 1183) He attempted, without success, on one later occasion to reach Pearsall by phone. He did not make another visit to the station. (TR 1168-69, 1171)

121. On May 1, 1981, Father Wieciek again sent a letter to Pearsall via registered mail. (RNJ Ex. 20) The letter said in part, "Since the last time we wrote you many months ago, we started sending you our P.S.A.s via first class mail. To this date we have not heard any on your radio station." (*Id.*)

122. On May 5, 1981, Pearsall responded. (RNJ Ex. 21) His letter stated:

> Frankly, I have not seen any announcements from your office whatever, nor do I know what has happened to them, if indeed they were ever received.
>
> The next time you send one, mail it to me, personally, at the above address.
>
> These announcements, if accepted by us for use on the air, are generally used on the 'Community Bulletin Board' program at 6:05 P.M., Monday through Friday.

123. Pearsall explained that he never received any tapes from Father Wieciek and that the only letters he saw from Father Wieciek were those to which he responded. (TR 1530)

124. Father Wieciek described the programs referred to in his May 1980 letter. (RNJ Ex. 16) "Becoming" was hosted by a young married couple. Each program dealt with a specific theme, such as rejection. Middle-of-the-road music was interspersed to highlight the theme. "Handle on Life," was hosted by a Catholic priest who was a clinical psychologist with the Catholic Welfare Bureau. The program dealt with problems concerning family life. Both "Becoming" and "Handle on Life" were public affairs programs. They did not deal with the problems discussed from an overtly religious standpoint, nor did they espouse any philosophy or belief unique to the Roman Catholic faith. "Chaplain's Corner" was hosted by the Roman Catholic chaplain at Rider College in Trenton and featured a discussion of problems listeners had written to him about. This program, which was interdenominational, was generally logged as a public affairs program.[68] (TR 1184-88) Father Wieciek explained that he tried to keep the programs he distributed from having an overtly Catholic or religious overtone so that he "would be better able to bring them into the marketplace." (TR 1194)

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[68] No evidence was offered that a program series dealing with Catholic doctrinal matters was available.

125. It is noted that during the license term, Station WAWZ-FM aired 96 public announcements for the U.S. Catholic Conference, 46 for the Catholic Relief Services and 179 for the Franciscan Fathers. (Pillar Ex. 7, pp. 177, 155, 160)[69] During the license period, Station WAWZ(AM) carried a weekly 15-minute program produced by the Maryknoll Fathers. (TR 575-76) Additionally, Station WAWZ-FM carried announcements on "Community Bulletin Board" and PSAs[70] for the following Catholic churches and organizations: The Archdiocese of Newark, Immaculata High School (Somerville), Knights of Columbus (Somerset Council), St. Joseph's School (Bound Brook), Paulist Communications, St. Bernard's Church (Bernardsville). (Pillar Ex. 62, pp. 5, 7, 9; Pillar Ex. 7, pp. 162, 163, 170, 174, 176)

126. According to a 1980 Pillar survey, Roman Catholics constituted the second largest religious group among Station WAWZ-FM listeners. (TR 149, 152-53) Somerset County included areas of heavy Catholic concentration. (TR 1129, 1166)

(3) Lawrence Tighe, Jr. Role re Father Wieciek's Letters

127. Father Wieciek first met Lawrence Tighe, Jr. when he first visited Station WRNJ in the summer of 1977. Since that time he has sought out Tighe's advice on whom to contact at particular stations because he believed Tighe was very involved with other New Jersey broadcasters. When he had a problem with a radio station, he would discuss the matter with Tighe because he felt Tighe was knowledgeable regarding FCC regulations. Father Wieciek first discussed Station WAWZ-FM with Tighe in late September or early October, 1980. He told Tighe the station had not responded to his letters. Tighe suggested sending the letters via registered mail. At that time, Father Wieciek was unaware of Tighe's plans to file a competing application for Station WAWZ-FM's facilities. Later, in January or February, 1981, Tighe told Father Wieciek in confidence that the application was going to be filed. (TR 1199-1202) Early in 1981, Tighe requested that Father Wieciek send him copies of everything sent to Station WAWZ-FM. (TR 1203) In late May or early June, Father Wieciek sent his entire file to Tighe. (TR 1205) It was at Tighe's request that Father Wieciek, via registered mail, sent his May 1, 1981 letter to Pearsall. (TR 1204)

(4) Broadcast of Mormon Tabernacle Choir

128. Station WAWZ-FM broadcast no programming concerning Mormonism or Christian Science during the license period except for musical

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[69] A Catholic priest and Catholic laymen appeared on the locally produced "Searchlight" program. (Pillar Ex. 7, pp. 16-17) Several of the public witnessess appearing on Pillar's behalf identified themselves as Catholics.

[70] The "Community Bulletin Board" announcements were not individually logged. The PSAs were.

selections performed by the Mormon Tabernacle Choir.[71] (Pillar Ex. 7; TR 131, 146-47, 249, 359-60)

129. None of the 50 Pastor Hosts on Evening Prayer Fellowship was a Mormon or Christian Scientist.[72] (Pillar Ex. 7, pp. 204-05; TR 131)

130. The Unitarian, Greek Orthodox, Ukranian Orthodox, Byzantine Catholic, United Church of Christ and Jehovah's Witnesses were also not represented on this program. (TR 131, 146, 249, 503-06; RNJ Ex. 35, pp. 9A-9C) Pillar did not invite ministers from any of these faiths to appear on Evening Prayer Fellowship or any other regularly scheduled program. (TR 154, 360, 504-07) The Pillar staff did not systematically contact area ministers by telephone or mail to indicate the availability of programming time on Station WAWZ-FM. (TR 336, 463)

131. Pillar explained that Pillar was not approached by members of the Mormon Church or the Christian Scientist to appear on the station. (TR 154, 249, 361) Pillar's broadcast policy coordinator acknowledged that he would not seek out someone to advocate the specific doctrines of the Mormon Church. He would, he explained, entertain broadcasting something on behalf of the Mormon Church if they wanted to broadcast something that would be of general interest and did not propagate a specific line of doctrine. (TR 155)

(1) Letters From The Public

132. During the license period 1593 letters, most unsolicited, were received by Pillar commending the operation of Stations WAWZ-FM and WAWZ.[73] Of those letters, 410 were from listeners in 33 communities within a ten mile radius of Zarephath; 266 were from residents of communities within a ten to twenty mile radius of Zarephath; and 913 were from listeners in communities outside the twenty mile radius of Zarephath. (Pillar Ex. 8, pp. 1-13)

133. Pillar presented a sampling of those letters at the hearing.[74] Many of the letters refer to specific religious or musical programs aired by Pillar of Fire. (Pillar Ex. 8, pp. 17, 19, 20, 21, 23, 25, 29-34, 36-41, 47, 51, 59, 60, 65, 66-67) Several letters are from listeners inquiring as to specific musical selections (*Id.*, pp. 17, 27, 45, 48, 66) or specific speakers or announcements aired by Pillar. (*Id.*, pp. 15, 18) A large number of the letters enclosed donations to Pillar for its continued operation of the radio

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[71] There were Mormon and Christian Science congregations in Somerset County. (TR 506-07; RNJ Ex. 35, pp. 9B, 9C)

[72] Nor were any of them Catholic.

[73] Some letters were requests for program schedules. The 1593 letters did not include any letters of complaint because they were kept in a separate file. (TR 422-23)

[74] In order not to burden the proceeding, Pillar did not produce all of the letters, but noted that they were available and would be produced if requested by the Presiding Judge or the Commission. (Pillar Ex. 8, p. 1 n. 1)

stations. (*Id.*, pp. 16, 22-23, 30-34, 36, 39-41, 44, 46, 53, 55-56, 58-60, 64-65, 67) Several of the letters were sent by listeners identifying themselves as being elderly. (*Id.*, pp. 34, 46, 53, 64, 74)

134. Listeners expressed enthusiasm over the quality of Pillar's programming. (Pillar Ex. 8, pp. 25, 38) Listeners expressed appreciation for the spiritual help and guidance provided by Pillar's programming during times of need. (*Id.*, pp. 32, 33, 43, 61)

135. Many elderly listeners expressed their appreciation of Pillar's programming. (Pillar Ex. 8, pp. 34, 46, 53)

(m) The Robert Pearce Letter

136. Robert Pearce, an acquaintance of Tighe's since 1972, signed and mailed a letter, dated March 23, 1981, to Station WAWZ-FM. The letter, complaining about the station's programming, was furnished by Tighe. (TR 1306-07; RNJ Ex. 10) In describing the circumstances that led him to sign the March 23, 1981 letter, Pearce testified that he and Tighe had discussed Tighe's intent to file an application "on top of" Station WAWZ-FM's license renewal application. Pearce asked if there was anything he could do to help. Tighe suggested that Pearce write a complaint letter to Station WAWZ-FM. Pearce agreed and after he "listened to Zarephath a couple of times," he again told Tighe that he would write it for him.[75]

137. Although the March 23, 1981 letter makes reference to Station WBRW, Somerville, Pearce admitted that at the time he signed the letter he had never listened to Station WBRW. (TR 1315-16) The March 23 letter stated that Pearce felt Station WAWZ-FM should be giving traffic reports and local news "during the hours listeners are driving to work." Pearce acknowledged that he had not listened to the station during a weekday morning and that his evening listening began "probably closer to seven." (TR 1318-19) Pearce acknowledged the he knew that Tighe planned to use the March 23 letter in connection with Radio's Sommerville application. The purpose of the letter was to see if Station WAWZ-FM would respond. He and Tighe anticipated that there would be no response or, if there was one, it would be negative. (TR 1320) Station WAWZ-FM's Program Director Pearsall responded by letter dated April 23, 1981.[76] (RNJ Ex. 11)

138. Pearsall, in his response, noted that Station WAWZ-FM's format was "listed with the F.C.C. as 'religious,' and we are not a 'news' or 'talk'

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[75] Prior to his offer to help Tighe, Pearce had never listened to Station WAWZ-FM. (TR 1312-14)

[76] On April 22, 1981, Tighe sent a copy of the March 23 letter to Pearsall along with a typed memo indicating that as of that date he had not received an answer to the first letter. (RNJ Ex. 35, pp. 4, 86) Pearsall's April 23 letter makes reference only to the March 23 letter and not the April 22 mailing. (RNJ Ex. 11)

station. . . ."[77] (RNJ Ex. 11, p. 1) Pearsall advised Pearce that two New York stations covered local news and events. (RNJ Ex. 11)

(n) Testimony of Community Leaders and Members of the Public

139. Seven elected public officials and 24 members of the general public testified in support of Station WAWZ-FM.[78]

140. The seven elected public officials testifying on behalf of Station WAWZ-FM were a U.S. Congressman whose district has not included any part of Somerset County; (Pillar Ex. 58; TR 1787) two New Jersey Assemblymen (Pillar Exs. 20 and 41); two Franklin Township Council members (Pillar Exs. 25 and 48); a mayor and a Somerset County Freeholder (Pillar Exs. 24 and 56). Of these seven officials, two had never listened to Station WAWZ-FM during the license period; namely, Manville's Mayor and one of the Assemblymen. (TR 787) The other Assemblyman listened 3 or 4 times a week for public service announcements and to music programs. (TR 1019, 1028) The Freeholder was an "infrequent" listener. (TR 1241) The Congressman listened to the station when he was in New Jersey. (TR 1788-89)

141. Franklin Township Councilman Michael Pappas listened to the station on a daily basis for eight years and listed several favorite programs, including "UPI Roundtable" and "Hymn Time." (Pillar Ex. 25) Franklin Township Councilwoman Joan Bottcher, a frequent listener, listed several programs to which she listened during Station WAWZ-FM's broadcast week. (Pillar Ex. 48)

142. The seven elected officials and the 24 public witnesses expressed the view that Station WAWZ-FM had rendered a service to the New Jersey area served by it. (Pillar Exs. 19-21, 23-27, 29-32, 34-37, 39-46, 49-53, 55-58) The 24 public witnesses expressed support for the station's programming, 20 citing its religious and inspirational programs. Many credited the station for its music while others cited its public affairs programs, public service announcements, school and court closings, weather information and its Regional News Review program. Some criticized commercial broadcast stations for their programming while others acknowledged that they listened to these stations to hear local news. Many had no recollection of hearing any local candidates for public

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[77] Pearsall further noted that Station WAWZ-FM had both news and public affairs programs, "with newscasts on the hour, for the most part." (RNJ Ex. 11)

[78] The written testimony of nine witnesses was rejected because they could not be produced for cross-examination. Pillar, limited to the presentation of no more than 40 public witnesses, proffered 86 other affidavits of community leaders and members of the general public which supported Station WAWZ-FM. (Pillar Ex. 60) The Presiding Judge ruled that this evidence was cumulative and rejected the proffer. (TR 62, 63, 1330) Several of the public witnesses who testified were former elected public officials of political units within the service area. (Pillar Exs. 19, 39, 49, 52)

office or any Somerset issues or news broadcasts on Station WAWZ-FM. (TR 829, 838, 903, 923-24, 1046, 1076-80, 1145, 1227)

143. It is appropriate to detail the testimony of the seven elected officials relative to Station WAWZ-FM's performance.

144. *Christopher H. Smith* is a member of the United States House of Representatives, representing New Jersey's 4th District.[79] He is a resident of Trenton. During the license period, he listened to Station WAWZ-FM between 15 and 30 minutes a day on an average and occasionally as long as half the day when he was in New Jersey. (TR 1789) Congressman Smith characterized Station WAWZ-FM's programming as "vibrant, family and community oriented." (Pillar Ex. 58) He cited drugs and rampant divorce as social ills that are ripping our municipalities apart and pointed out that the ministers appearing on Station WAWZ-FM addressed these issues on a daily basis — reaching out with real answers. He explained (TR 1798):

> I think what they are doing in reaching out to those people is a great service. We have many new stations throughout the State of New Jersey that are providing the data on what is happening around us. We do not have all that many stations that are providing, I think, for the inner man, and I think that is what Station WAWZ helps to provide, not only through the music, which is soothing and provides a respite for . . . very busy and just difficult days, but through the drug outreach and through the divorce work and that kind of thing.

145. Congressman Smith was a candidate in Congressional primary and general elections in 1978 and 1980. (TR 1777-78) As a candidate he did appear on Station WCTC(AM), New Brunswick-Middlesex County, and Station WHWH(AM), Princeton-Mercer County. He explained that Station WHWH(AM) would be the station a chief executive officer of a municipality in Somerset County would most likely look to present information to his or her residents. (TR 1801)

146. As far as Rep. Smith knows, Station WAWZ-FM is not geared toward covering elections. To hear local news or public affairs dealing with local issues in Somerset or Middlesex Counties, he tuned in to Station WCTC(AM). (TR 1799) He characterized the outreach of Station WAWZ-FM as reaching to the hearts and hurts of people as well as providing balm and enjoyment with its music. (TR 1799)

147. *Joan Bottcher* is a member of the Franklin Township Council, representing the Second Ward which includes Zarephath. (TR 1116) She also is the liaison on the township's Industrial Development Committee and a Catholic religious teacher. She has listened to Station WAWZ-FM for 16 years. The station, she asserted, "has set my spirit on the right path" and serves the area with announcements of various cultural, civic and religious events. (Pillar Ex. 48, p. 1) Among the programs she

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[79] Somerset County is not within the 4th District. (TR 1787)

regularly listened to are "The Word and The World," "Community Bulletin Board" and "UPI World News." (Pillar Ex. 48) "Community Bulletin Board" included such items as the scores of Immaculata High School's games.[80] (TR 1131-32)

148. Councilwoman Bottcher identified a contested Franklin Township election held in 1979 in which she was elected to office. (TR 1125) She did not appear on Station WAWZ-FM to advocate her candidacy. (TR 1125) To her knowledge, neither did her opponents. (TR 1126)

149. *Michael Pappas* is Councilman-at-large for Franklin Township and has been active in local politics for the past 4 or 5 years. (Pillar Ex. 25, p. 1; TR 856) He has listened to Station WAWZ-FM on a daily basis for the past eight years and found the station's management very willing to cooperate in meeting the needs of civic organizations by making announcements of their events and activities. (Pillar Ex. 25) According to Pappas, the station broadcast God's message, stressing the importance of the individual and helping each person to take steps toward solving their problems and to be at peace with themselves. (TR 875-77)

150. His favorite Station WAWZ-FM programs include UPI Roundtable, UPI World News, Regional News Review, Salute to the Flag[81], Hymn Time and the Pillar worship services. He commended Station WAWZ-FM for making announcements for community organizations and for instilling traditional family values and patriotism in its listeners. (Pillar Ex. 25, p. 1)

51. To Pappas' knowledge, candidates for public office had not appeared on Station WAWZ-FM to advocate his or her election. (TR 857) Pappas identified contested Franklin Township elections held in 1978, 1979 and 1981, and a contested Somerset County election held in 1980. (TR 861-63, 868) He did not recall any candidates from any of these campaigns appearing on the station. Nor did her recall any discussion of local issues on the station. (TR 866-70)

152. Pappas never asked for time on Station WAWZ-FM for any of the candidates for whom he was working. (TR 882) Although he did not know of any local official or candidate who was denied access to the station, he believed officials and candidates did not request time on the station because they felt it was not something with which the station wanted to become involved. (TR 882) According to Pappas, candidates looked to Station WCTC(AM) in New Brunswick (Middlesex County) and to area newspapers for coverage of their positions on local issues. (TR 882)

153. *Elliot Smith*, a resident of Hillsborough, is a New Jersey State Assemblyman representing District 16 which includes portions of Somerset, Morris and Hunterdon Counties. (Pillar Ex. 20; TR 1017-18) He is a

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[80] Immaculata is a Catholic school in Somerville which Ms. Bottcher's children attended.

[81] Salute to the Flag was a 15-minute music program consisting of American march music. (TR 1063)

resident of Belle Mead in Hillsborough Township.[82] (TR 1015, 1034) He has been a Station WAWZ-FM listener for 25 years, listening an average of an hour a week during the license period. Smith primarily listened to the classical music programs and public service announcements. Station WAWZ-FM broadcast public service announcements for some of the organizations with which Assemblyman Smith is or has been associated. (Pillar Ex. 20, p. 1; TR 1019, 1028, 1030) He related he relied on several other stations in the area for news of Somerset County. He identified those stations as WBRW, Somerville; WCTC, New Brunswick; WERA, Plainfield; and WMTR, Morristown. (TR 1032-33)

154. Smith was involved in a contested State Assembly election in 1979. (TR 1020) He did not appear on Station WAWZ-FM. Although political candidates were asked by various radio stations to participate in forums, Station WAWZ-FM never asked them do to so. He never asked to be on the station. (TR 1020)

155. *Marion B. Dudash* is the Mayor of Manville, Somerset County, New Jersey, which is approximately five miles south of Somerville. Although not personally a listener during the license period, she had been told about the station by two close friends and was impressed with the overall selection of programming. She stated that central New Jersey, especially Somerset County, has more than adequate coverage by local commercial radio stations such as Stations WBRW(AM), Somerville, and WCTC(AM) and WMGQ-FM, New Brunswick and WERA(AM), Plainfield. It is her belief that an alternative is needed. She stated that a radio station such as Station WAWZ-FM is essential and necessary to provide listeners with a balance of available programming and an alternative to commercial stations. (Pillar Ex. 56; TR 959, 961-62) Mayor Dudash had never heard of any person being denied access to time on Station WAWZ-FM. (TR 970)

156. *John J. Kitchen,* a resident of Neshanic Station, is Deputy Director of the Somerset County Board of Chosen Freeholders, former Mayor of Branchburg and a member of the Branchburg Township Planning Board. As a member of the Board of Chosen Freeholders, he recommended renewal of Station WAWZ-FM's license.[83] (Pillar Ex. 24) In his direct written testimony, Kitchen expressed appreciation for the station's news, public service announcements and variety of music. He cited the "excellent family-type programs that deal with youth, marriage, drugs, social issues and many other pressing subjects that confront our communities." (Pillar Ex. 24) Kitchen acknowledged that his direct

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[82] Belle Mead is five miles from Zarephath. (Pillar Ex. 5, p. 1)

[83] Two substantially similar affidavits were submitted by Vernon A. Noble, Director of the Somerset County Board of Chosen Freeholders, and Christine Todd Whitman, a member of the Board. (Pillar Exs. 30, 35) They were received in evidence for a limited purpose. (TR 12062-63)

written testimony was drafted by the deputy clerk of the Board, a Ms. Lucas[84], but confirmed that it accurately represented his views and sentiments. (TR 1237) During the license period, he listened to Station WAWZ-FM for its music once every week or two. (TR 1241-42, 1259)

157. Kitchen identified contested Somerset County Freeholder elections held in November 1978, 1979, and 1980. (TR 1249-51) He was not aware of any candidate for public office appearing on Station WAWZ-FM to advocate his or her candidacy. He did not rely on the station for news. (TR 1259)

158. *Joseph Patero* is a life long resident of Manville and has formerly served that community as a Councilman and as Mayor. Since 1973, he has served as a State Assemblyman. His district includes Franklin Township. (Pillar Ex. 41; TR 776-77, 780-81) Although he didn't listen to Station WAWZ(AM), he recognizes "the importance of religious broadcasting in strengthening the traditional values of the family" and expressed the view that Station WAWZ-FM should be allowed to continue this type programming. (Pillar Ex. 41; TR 786-87)

159. Patero never appeared on Station WAWZ-FM to express any views concerning his candidacy in election campaigns and he never asked to appear on Station WAWZ-FM for the purpose of espousing his candidacy. (TR 780, 788) Had Patero wanted to listen to local news during the license period, he would have listened to stations in New Brunswick (Middlesex County) or Princeton (Mercer County), New Jersey. (TR 781)

(o) Promise Versus Performance and Treatment of Controversial Issues of Local Importance

160. In its 1978 license renewal application Station WAWZ-FM proposed to air the following amounts of non-entertainment programming in a typical week: 360 minutes (4.76%) of news; 180 minutes (2.38%) of public affairs, and 3,900 minutes (51.58%) of all other programs exclusive of entertainment and sports. This resulted in 4,440 minutes (58.72%) of non-entertainment programming proposed by Pillar.

161. During the composite week for the renewal period, Station WAWZ-FM broadcast 491 minutes (6.42%) of news, 283 minutes (3.72%) of public affairs and 4,122 minutes (53.93%) of all other programs exclusive of entertainment and sports. Non-entertainment programming broadcast during the composite week totalled 4,896 minutes (64.07%). (Pillar Ex. 10, p.1)

162. As noted, *supra,* Station WAWZ-FM is the only full-time radio station licensed to serve any community in Somerset County, New Jersey, a county with over 200,000 residents. (TR 99, 248, 533; RNJ Ex. 41, p. 6)

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[84] Pillar Exhibits 30 and 35, which contained the same language, were received in evidence for the limited purpose of establishing that fact. (TR 1239, 1262-63)

As also noted, *supra*, during 34 weeks, or 22%, of the license period, Station WAWZ-FM produced no local news programming. (Pillar Ex. 7, p. 3; TR 1477-78) On eight occasions during the license period Station WAWZ-FM broadcast a local public affairs program. (Pillar Ex. 7, pp. 8-9; TR 412-13, 439, 602)[85]

163. Some of Pillar's public witnessess, when questioned by counsel for Radio, agreed that certain local issues were important to the Somerset County area during the license period. These issues were: asbestosis[86] (TR 255, 783, 964, 1257-58, 1502); the Bridgewater Commons Mall[87] (TR 1246-47, 1498); construction of Interstate 95 (TR 792, 867, 1247); student transfer from Somerville High School (TR 920-23, 1244); Sunday closing laws (TR 280, 1248) and others. Neither the public witnesses or principals of Pillar could recall these issues being considered on Station WAWZ-FM. (TR 255, 472, 783, 792, 867, 923, 1252-53, 1259, 1498)

164. Regional News Review was not a program where individuals expressed their views but was rather a vehicle for giving a weekly review of local news events. (TR 1455, 1499-1500) News related to the construction and completion of Interstate 95 was reported on this program, on April 21, 1979 (Pillar Ex. 63, p. 14); April 12, 1980 (*Id.*, p. 30); April 26, 1980 (*Id.*, p. 31); May 17, 1980 (*Id.*, p. 32); and January 24, 1981 (*Id.*, p. 44). Similarly, the proposal to build the Bridgewater Commons was reported on July 1, 1978 (Pillar Ex. 62, p. 16); February 10, 1979 (Pillar Ex. 63, p. 4); March 3, 1979 (*Id.*, p. 8); March 17, 1979 (Id., p. 9); March 24, 1979 (Id., p. 10); and March 31, 1979 (*Id.*, p. 11). Additionally, the Sunday closing laws matter in Somerset County was reported on July 29, 1978 (Pillar Ex. 62, p. 17); June 21, 1980 (Pillar Ex. 63, p. 34); September 27, 1980 (*Id.*, p. 38); and November 15, 1980 (*Id.*, p. 41). This program also reported on the subject of pollution and toxic waste (Pillar Ex. 62, p. 15; Pillar Ex. 63, pp. 7, 13, 19, 22) and covered local and state tax matters and local area school concerns (Pillar Ex. 62, pp. 14-16, 18-20; Pillar Ex. 63, pp. 5-10, 15-18, 19, 21, 23, 25-26, 28, 30-31, 33-37, 40-41, 45, 47, 49, 51)

165. Station WAWZ-FM produced no programs devoting coverage to local elections during the license period, although Somerset County and its political subdivisions had elections during the license term. (TR 188,

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[85] Station WAWZ-FM did not broadcast any local public affairs programming during the composite week. (RNJ Ex. 12) It broadcast public affairs programs on 4 occasions in 1978, 2 in 1979, 1 in 1980 and 1 in 1981 during the renewal period. (Pillar Ex. 7, pp. 8-9) Twelve of Pillar's public witnesses could not recall hearing any programs on Station WAWZ-FM dealing with a discussion of controversial issues of local importance. (TR 792, 827, 838, 870, 909, 923, 935, 977, 1046, 1097, 1145, 1699)

[86] Asbestos was manufactured by Johns Manville Corporation at its plant in Manville, New Jersey. (TR 1257-58) Manville is located less than a mile from Zarephath. (TR 786)

[87] There was a proposal to build a regional shopping mall in the Bridgewater/Somerville area. (TR 483, 491) Bridgewater is located five miles from Zarephath. (TR 1498)

242, 861-63, 868, 960-61, 1020, 1125, 1249-51, 1449, 1502) The station did not broadcast information concerning County ballot questions during the license period. (TR 482)

166. Station WAWZ-FM's General Manager pointed out that other local radio stations and newspapers dealt effectively with Somerset County elections and issues. (TR 472) Station WBRW(AM) in Bridgewater, New Jersey, was one of the stations on which Station WAWZ-FM relied for the public to get information about Somerset County elections and public events. (TR 534) Station WBRW(AM) had a wire service, 10 or 12 full-time staff members, local reporters, local news broadcasts, presentations by candidates, local public affairs programs and discussions of controversial issues of public importance. (TR 534) Crawford felt that Station WAWZ-FM complemented that service in the pastoral realm with its religious programming, explaining that Station WAWZ-FM could not be a news, sports, interview and traffic station. (TR 472, 502)

167. Several public witnesses confirmed that other stations in the area covered local news of the Somerset County area. The stations specifically mentioned included Stations WBRW, Somerville, WCTC(AM), New Brunswick, WERA(AM), Plainfield, WMTR(AM), Morristown. (TR 797-98, 840, 1029-30, 1033)

168. Blacks constitute 22,410 of the population of Somerset County in which Station WAWZ-FM is located, (TR 328-29)[88] The station did not broadcast any programs during the license period specifically geared to the needs and interests of Blacks. However, individual Blacks appeared on the station: Rev. Cameron appeared on Evening Prayer Fellowship (TR 414); a Liberian man played live guitar music on the Sunday evening worship service (TR 528); and a pastor and his two daughters who were musically talented sang and performed early in the license period on Evening Prayer Fellowship. (TR 529)

(p) Comparison With Other FM Stations

169. A comparison of the 1981 composite week performance of 14 other commercial FM stations licensed to communities located in Station WAWZ-FM's 10 county service area[89] disclosed that 7 devoted a smaller

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[88] According to the 1980 U.S. Census report, Franklin Township had a population of 31,358, of which 7,028 (or 22.4) percent were Black. (RNJ Ex. 41, p. 20)

[89] These New Jersey FM stations are: WCHR, WKXW, and WPST, Trenton, WDHA, Dover, WFMF and WVNJ, Newark, WFMV, Blairstown, WHTG, Eatontown, WIXL, Newton, WJLK, Asbury Park, WMGQ, New Brunswick, WPRB, Princeton, WSUS, Franklin, and WWUU, Long Branch. (Pillar Ex. 10, pp. 3-4) Pillar introduced no evidence that the communities of license of the stations serving other markets had needs and interests similar to Zarephath or Somerset County. Nor did it introduce evidence of the composite week programming percentages for Station WAWZ(AM) and WBRW(AM), the only other Somerset County stations. (Pillar Ex. 3, p. 1; TR 532-33)

percentage of time to news and all 14 devoted a smaller percentage of time to public affairs. In the "other" non-entertainment programming category only one station, Station WCHR, Trenton, had a greater percentage than Station WAWZ-FM (82.0% versus 53.93%). (Pillar Ex. 10, pp. 2-4)

170. A comparison of the percentages of air time devoted by Station WAWZ-FM to the various non-entertainment programming categories with the corresponding average percentages of the 14 other stations reveals the following:

News:	Average	8.0%
	Station WAWZ-FM	6.42%
Public Affairs:	Average	2.0%
	Station WAWZ-FM	3.72%
All Other Programs Exclusive of Entertainment and Sports:	Average	10.5%
	WAWZ-FM	53.93%

(q) Station WAWZ-FM's Staffing and Budget

171. Station budget limitations kept Station WAWZ-FM to a staff of five or less full-time employees. (TR 559) Pillar had no production budget for Regional News Review. The program was produced and broadcast by a newsman working for a nominal stipend. (TR 563-64) However, the President of Pillar was unaware of the Board of Trustees being asked during the license period to allocate funds for additional news or public affairs programs. (TR 235)

172. The sources of revenues for Station WAWZ-FM included compensation for carrying programs, contributions from the public and funds controlled by the Pillar organization. (TR 350)

173. Pillar received compensation for most of the syndicated religious programs broadcast by Station WAWZ-FM, including Keys to Better Living and The Word and The World. (TR 112, 446-47) Pillar also received compensation for all of the ten non-Pillar local church services broadcast by Station WAWZ-FM. (TR 333, 461)

174. Pillar also raised funds through Shareathon appeals, during which Station WAWZ-FM preempted its regular programming, including news, to discuss the thrust and mission of the station and give people a chance to share in the cost of operation. (TR 429) Station WAWZ-FM held three-day Shareathons in 1978 and 1979. (TR 430) In its Shareathons, Station WAWZ-FM asked for listener support for acquiring equipment and studio facilities. Pillar used the money to purchase a new console, turntables, tape recorders or engineering equipment.[90]

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[90] Pillar did not seek funds to produce additional local news or public affairs programs. (TR 434)

C. Radio New Jersey

(1) Make-Up of Radio New Jersey

175. *Radio New Jersey* (Radio or RNJ) is a corporation whose officers, directors and shareholders are (RNJ Ex. 1):

Shareholder	*Interest*	*Office*	*Director*
Lawrence J. Tighe, Jr.[91]	33 1/3%	President	Yes
Norman L. Worth	33 1/3%	Vice President	Yes
Lawrence J. Tighe, Sr.[91]	33 1/3%	Secretary Treasurer	Yes

(2) Other Media Interests

176. RNJ is the licensee of Station WRNJ(AM), a daytime-only station operating on 1000 kHz and licensed to Hackettstown, New Jersey. RNJ commenced operation of Station WRNJ(AM) after receiving program test authority on August 25, 1976. On July 13, 1982, the station received a construction permit authorizing an increase in power from 1 kw to 2.5 kw during non-critical hours.[92] (RNJ Ex. 2, p. 1) Station WRNJ is now operating under that authorization. (RNJ Ex. 2, p. 1; TR 654) Its application for license (BL-821230AD) was granted on July 22, 1983.

177. Hackettstown is located approximately 25 miles from Somerville. (TR 697) RNJ's proposed FM station will place a 1 mV/m or better signal over Hackettstown and approximately 57% of the area within the 0.5 mV/m calculated service contour of Station WRNJ(AM). (TR 671; Joint Ex. 1, Fig. 2) Zarephath and Somerville are near the outer edge of the 0.5 mV/m service contour of Station WRNJ(AM). Approximately 20% of the proposed FM service area is encompassed within the 0.5 mV/m contour of Station WRNJ(AM). (Joint Ex. 1, Fig. 2)

178. With the exception of Station WRNJ(AM), neither RNJ nor any of its principals has any ownership interest in, or is an officer or director of, any other broadcast station, cable television system, subscription television company, advertising agency, newspaper or magazine publishing company, entertainment production company, or any other form of mass media. (RNJ Ex. 2, p. 1)

(3) Integration of RNJ's Principals

179. *Norman L. Worth*, RNJ Vice President and 33 ⅓% stockholder, will be the full-time General Manager of RNJ's proposed Somerville FM station. He will be the individual in charge of the day-to-day supervision

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[91] All further references to Lawrence J. Tighe or Tighe are to Lawrence J. Tighe, Jr.

[92] The two hours after authorized sunrise sign-on are critical hours as are the two hours before sign-off at sunset. Station WRNJ(AM) operates at 1 kw during critical hours. Station WRNJ(AM) does not have any pre-sunrise operating authority. (TR 672-73)

and administration of all station operating functions. He will also formulate station policies together with Lawrence J. Tighe. He will supervise and oversee department heads to assure compliance with governmental regulations. (RNJ Ex. 3, p. 1) He will maintain the station's public file and respond to audience comments, complaints and suggestions. (RNJ Ex. 3, p. 2)

180. Worth will participate in the planning and construction of the station's physical plant and will formulate and execute start-up plans for the station. He will formulate and prepare staff plans, conduct employment interviews, and recruit station personnel. As General Manager, he will be directly involved in the training and supervision of station department heads and other personnel. He will be responsible for the implementation and administration of the station's Equal Employment Opportunity program. (RNJ Ex. 3, p. 1)

181. Worth will also be responsible for the planning and design of the station's program schedule. He will select news, public affairs, entertainment and religious programs for broadcast and will formulate editorial policy and monitor programs and announcements broadcast by the station. (RNJ Ex. 3, pp. 1-2; TR 741-42)

182. Worth will participate in the sale of commercial time to station advertisers and sponsors and the provision of time for local public service announcements. He will work with the station's Sales Manager in preparing sales materials, advertising contracts and certificates of broadcast and will maintain primary responsibility for agency sales and will oversee the preparation of station program logs, invoices and account records. (RNJ Ex. 3, p. 2)

183. Worth has been a resident of Hackettstown, New Jersey, since 1977.[93] Hackettstown is 25 miles from Somerville but within the service area of RNJ's proposed Somerville station. If RNJ is awarded the license, Worth will move to a location "within the service area" of RNJ's proposed station. (RNJ Ex. 3, pp. 2-3; TR 734)

184. Worth will spend a minimum of 40 hours per week at the station. He does not contemplate holding other full-time or part-time employment of any kind. (RNJ Ex. 3, p. 3) Worth plans no operational participation at Station WRNJ(AM) upon grant of RNJ's Somerville application. He will have some involvement with Station WRNJ(AM) in connection with his corporate responsibilities, such as an occasional telephone conversation. (TR 733) Worth will report directly to the RNJ Board of Directors, on which he serves. (RNJ Ex. 3, p. 3)

185. While in high school, Worth worked as a part-time sports announcer at Station WFLR, Dundee, New York (1967-68). While attend-

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[93] Worth has never lived in or visited Somerville other than to attend a deposition relating to this proceeding. (TR 731)

ing announcer school in New York City, he became involved in the production of the Barry Farber talk show on Station WOR(AM), New York, New York. He was also involved in syndicating the program to other stations.[94] In 1977, Worth joined Station WRNJ(AM) as a news reporter and has held various other jobs including disc jockey, copywriter, program director, assistant general manager and director of operations. He is presently station manager of Station WRNJ.[95] (RNJ Ex. 4, pp. 1-3)

186. Worth has been a resident of Hackettstown[96] for over five years and has involved himself in a number of civic activities in the Hackettstown area, particularly through his work at Station WRNJ(AM). He has been a speaker at the Career Days of various schools and at Kiwanis and Jaycees meetings. He was a member of a fund raising team for the Hackettstown Hospital emergency area expansion, personally raising over $10,000 in pledges. He chaired the Hackettstown Trade Association Advertising Committee which organized promotions to establish a healthier retail climate.[97] He is currently a member of the Hackettstown Hospital Auxiliary Entertainment Committee. Worth also actively participated in a variety of campaigns by non-profit groups by writing and producing promotional campaigns run on Station WRNJ(AM). For five years, Worth was an announcer for the Hackettstown High Football games broadcast by Station WRNJ(AM). He has played on the Station WRNJ(AM) basketball team that helps raise money for charitable purposes.[98] (RNJ Ex. 4, p. 4; TR 730)

187. *Lawrence J. Tighe*, RNJ President and 33 ⅓% stockholder, will be the Chief Engineer of RNJ's proposed Somerville FM station. Tighe will spend a minimum of 20 hours per week at the Somerville station. He will also spend additional time on Somerville FM matters in Hackettstown. (RNJ Ex 3, p. 3) He will supervise the planning and construction of the station's physical plant and will participate in the formulation and execution of start-up plans for the station. (RNJ Ex. 3, p. 3)

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[94] Worth was a director in charge of organizing the on-air effort of the Station WOR(AM) Barry Farber talk-show. He became involved in the syndication effort, contacting stations about the possibility of carrying the program and verifying that stations had run the commercials of the program sponsors. Worth also was involved in the syndication of "Farber Footnotes," a series of 90-second commentaries, to radio stations. (RNJ Ex. 4, p. 2)

[95] In December 1980 Worth purchased a 33 ⅓% interest in RNJ. In late 1981, Worth became Station Manager of Station WRNJ(AM) with increased involvement in legal and financial affairs and responsibility for compliance with FCC regulations. (RNJ Ex. 4, p. 4)

[96] As noted, *supra*, Hackettstown is within RNJ's proposed 1 mV/m contour.

[97] Station WRNJ benefited by the sale of advertising from promotions organized by the Advertising Committee. (TR 736)

[98] Worth has had no involvement in any civic activities relating to Somerville, New Jersey. (TR 731)

188. Tighe will also be responsible for the station's compliance with FCC technical standards and regulations. He will conduct periodic proof-of-performance tests and make other measurements to verify the station's compliance with those technical standards. (RNJ Ex. 3, p. 3) Tighe will be responsible for the maintenance and repair of station technical equipment. He will monitor station equipment operating practices and will prepare and review operating records and logs on a routine basis. (RNJ Ex. 3, p. 4)

189. Tighe will oversee the purchase of capital assets, particularly technical equipment. (RNJ Ex. 3, p. 4) In addition to his engineering duties, Tighe will actively participate on a daily basis in the formulation and administration of station operating policies, particularly in the areas of programming, personnel, EEO compliance, regulatory affairs and financial planning. (RNJ Ex. 3, p. 4; TR 692, 698-99, 712-13, 716, 719, 742)

190. Tighe will discuss programming matters with the General Manager, Worth, on an informal basis over lunch. (TR 717) Worth will have the ultimate responsibility for programming decisions.[99] (TR 741-42)

191. Tighe is a resident of Hackettstown, New Jersey, which is within the proposed 1 mV/m contour, and will maintain his residence in Hackettstown if Radio's Somerville application is granted. He will commute to Somerville on a regular basis to fulfill his commitment to the proposed Somerville facility. (RNJ Ex. 3, p. 4) Tighe lived in Neshanic, New Jersey in Somerset County for approximately eight years before moving to Hackettstown in 1980.[100] (RNJ Ex. 5, p. 1) Neshanic is seven miles from Somerville. (TR 694)

192. Tighe was born on February 18, 1940, in Irvington, New Jersey. He is a life-long resident of New Jersey. (RNJ Ex. 5, p. 1)

193. Tighe received his First Class operator's license while he was in high school. While attending Fairleigh Dickinson College (1958-63), he worked during vacation periods as a disc jockey and newsman at Station WNNJ(AM), Newton, New Jersey. Tighe was a full-time transmitter engineer for Stations WOR-TV, WOR(AM) and WOR-FM. He worked on the installation of a 100 kw WOR-TV transmitter and a 10 kw Station WOR-FM transmitter in the Empire State Building and a 50 kw Station WOR(AM) transmitter in Lyndhurst, New Jersey. He designed, for use in the Station WOR helicopter, one of the first non-directional airborne microwave ENG (electronic news gathering) systems in the country. Tighe also worked on the design and installation of the master control

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[99] At Station WRNJ, the Station Manager is responsible for programming decisions. (TR 716)

[100] Tighe claims no civic involvement with Hackettstown, New Jersey. While living in Neshanic he was a member of the local Big Brothers Chapter and the YMCA. (RNJ Ex. 5, p. 1) His membership in the YMCA was primarily to gain access to its facilities. (TR 693) His involvement with the Big Brothers was only of a few months duration and he gave it up because it interfered with his job. (TR 693-94)

room and television studio 81B for Station WOR-TV's facility at 1481 Broadway in New York. Tighe remained at RKO for 13 years until 1976 when he resigned to devote his full time to managing Station WRNJ(AM). (RNJ Ex. 5, pp. 1-2)

194. Since 1976, Tighe has provided service as a contract engineer for Station WSUS(FM), Franklin, New Jersey, He has also provided engineering services to non-commercial educational Station WNTI-FM, licensed to Centenary College in Hackettstown, New Jersey. He has lectured at Centenary College concerning Commission EEO requirements and employment opportunities for women in the broadcast industry. (RNJ Ex. 5, p. 2)

195. Tighe's main areas of responsibility as General Manager of Station WRNJ(AM) have been programming, engineering, regulatory affairs, personnel and EEO compliance, and financial planning. He has been primarily responsible for determining the program schedule and philosophy of the station. (RNJ Ex. 5, p. 2; TR 685)

196. Tighe was actively engaged in the original construction of the Station WRNJ(AM) facilities and has maintained those facilities since that time. He set up the Station WRNJ(AM) public affairs, news and community service programming and planned the original entertainment format. He hired the original staff and has remained involved in employment matters. (RNJ Ex. 5, p. 2)

197. Tighe holds an amateur operator's license (Amateur-General K2JIA). (RNJ Ex. 5, p. 3)

(4) Auxiliary Power

198. RNJ proposes to install an emergency power standby generator at its transmitter site and a power fed inverter at its studio site. These auxiliary power sources will be capable of powering essential station operating equipment during power outages.[101] (RNJ Ex. 7)

(5) RNJ's Proposed Programming

199. RNJ's programming proposal will be relevant only if it is determined that Pillar deserves no renewal expectancy. The Commission in *Deregulation of Radio*, 84 FCC 2d 968, at 989[102] ruled that the Presiding Judge will weigh the challenger's proposal and determine whether it is anything more than a "blue sky" proposal.[103] The Commis-

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[101] The record does not support a finding that Pillar proposes to install an emergency power standby generator.

[102] *aff'd sub nom. Office of Communications of United Church of Christ v FCC*, 707 F. 2d 1413 (D.C. Cir. 1983).

[103] Pillar, in its Reply, filed October 31, 1983, does not contest that "such a typical programming proposal" as that put forth by RNJ "is capable of effectuation." (Para. 33)

sion made clear, however, that such evaluation of the challenger's programming proposal would be made only if the incumbent's performance was minimal. The Presiding Judge ruled that RNJ's programming proposal was received in evidence for this limited purpose. (TR 657-666)

200. RNJ's proposed station will operate 24 hours per day. Its non-entertainment programming has been designed to meet the special problems, needs and interests of Somerville (1980 population: 11,973). (RNJ Ex. 6, p. 3; RNJ Ex. 41, p. 6) The station will seek to serve all of Somerset County. With some exceptions, RNJ will present at least five minutes of local and area news and five minutes of national and world news each hour. In morning and afternoon drive times, RNJ will increase the amount of local and area news to approximately 10 minutes per hour. Local news will include coverage of governmental activities such as township and borough meetings and County Freeholder meetings. (RNJ Ex. 6, p. 3)

201. RNJ proposes to produce and present the following programs:

> *In The News.* The RNJ news department, together with other members of the local news media, will host this 60-minute weekly program. The program will cover local and county issues in detail and will focus on the local impact of national events. On some of the programs local, county and state officials will be interviewed. The hosts will invite listeners to contribute to the discussion. (RNJ Ex. 6, p. 5)
>
> *Minority Perspective.* A weekly 30-60 minute program for the discussion of problems, opportunities and interests of minorities. Listeners will be invited to contribute to the program. RNJ principal Lawrence J. Tighe has contacted the President of the Plainfield, New Jersey chapter of the National Association for the Advancement of Colored People, and she has agreed to participate in the program.[104] (RNJ Ex. 6, pp. 4, 85-86; TR 700)
>
> *Chatting With ....* Somerset County Freeholders will be asked to host a program that will focus on county government and local issues and areas of concern. (RNJ Ex. 6, p. 6)
>
> *Straight Talk.* RNJ will invite the Congressman representing the Somerville area to discuss his activities in Washington and take calls from constituents on a monthly 60-minute program. (RNJ Ex. 6, p. 6)
>
> *Feedback.* The RNJ news department will have a person "in the streets" in quest of local reaction to national, state or local current events. These comments will be edited and aired in 5-minute segments broadcast a number of times during the week. (RNJ Ex. 6, p. 5)
>
> *Tax Facts.* This 30-60 minute program will be aired once a week during the tax season. Tax Facts will be produced by RNJ's staff in Somerville and will be hosted by an RNJ staff member together with Internal Revenue Service and New Jersey tax officials. The program will provide information and advice to local taxpayers for filling out their federal and state tax returns. Listeners will be asked to call with their questions. The RNJ staff member will pose commonly-asked questions to the

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[104] The Plainfield chapter of the NAACP is the representative office for the Somerset County area. (TR 701)

experts. The New Jersey tax office is located in Somerset County. They have a standing offer to participate in RNJ's program. (RNJ Ex. 6 p. 5; TR 701-02)

The Doctor Is In. Area doctors and hospital officials will host this weekly 30-60 minute program. With their medical perspective, the hosts will discuss various diseases and help listeners lead a healthier life. The hosts will open the phone lines to field questions from listeners. (RNJ Ex. 6, p. 4)

Listeners' Legal Forum. Local attorneys will host this weekly 30-60 minute program. They will discuss the legal ramifications of current news events and cover various areas of common listener concern such as crime, personal finance, education and real estate. The hosts will have occasional guests and will ask listeners to phone in their questions or comments. (RNJ Ex. 6, p. 4)

202. RNJ will air a syndicated talk show program hosted by news journalist Barry Farber during the overnight period. Farber's past topics have included discussions of behind-the-scenes activity during historical happenings, improvements in our educational systems, the type of government best suited for foreign countries and many other controversial issues that provoke interesting conversation. (RNJ Ex. 6, p. 5)

203. The entertainment portion of the broadcast day will consist primarily of recorded popular music selected to appeal to the over-25 audience. (RNJ Ex. 6, p. 3)

204. RNJ's programming proposal for Somerville is based on its experience in producing similar programming at Station WRNJ(AM) in Hackettstown, New Jersey. (TR 722)

205. The individuals who will be primarily responsible for implementing RNJ's Somerville programming will be RNJ principals Worth and Tighe.[105] (RNJ Ex. 6, p. 1) Tighe will spend approximately 10 of his minimum of 20 hours per week at the Somerville station on programming matters. (TR 719)

II. Station WRNJ(AM) Promotional Materials Issue

(a) Station WRNJ's First Sales Package - April 1978

206. RNJ is the licensee of Station WRNJ(AM), Hackettstown, New Jersey, which has been on the air since August, 1976. Lawrence J. Tighe, President of RNJ since its inception, was actively involved in the construction of Station WRNJ's facilities and has been the General Manager of the station since it went on the air. (RNJ Ex. 32, p. 1)

207. When Station WRNJ began operating in 1976, the station's only promotional material was a sheet of paper listing rates. At that time, the station relied on personal and telephone contacts to sell advertising time. RNJ used the rate sheet because Tighe knew that other radio stations used such sheets. (RNJ Ex. 32, p. 2)

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[105] Worth and Tighe have been responsible for establishing and coordinating the news, entertainment and public service programming at Station WRNJ(AM). (RNJ Ex. 4, p. 3; RNJ Ex. 5, p. 2)

208. As late as 1978, Station WRNJ's sales material was still very informal. The station was using rate sheets photocopied on white paper. The station printed these sheets for promotional campaigns in Hackettstown. (RNJ Ex. 30, p. 1; TR 1606)

209. In late 1977 or early 1978, Russell Caron, Station WRNJ's Sales Manager, began making plans for a station sales package. Sheldon Talada, a member of the sales staff and Caron's eventual successor as Sales Manager,[106] also became involved in the development of the sales package in early 1978. (RNJ Ex. 32, p. 2) Caron and Talada discussed the need for a sales package with Tighe. (TR 1607) They were aware that other stations in the area had sales packages utilizing graphics, copies of which they had collected from clients. (TR 1607) A decision was made to create a sales package utilizing graphics. Talada, the then Sales Manager, coordinated the production of the first sales package. (TR 1607, 1690; RNJ Ex. 30, p. 1)

210. In April 1978, Tighe had Station WRNJ's first sales package printed on olive green paper. (RNJ Ex. 32, p. 2) RNJ used this sales package for three months and distributed 100-200 copies of the package to advertisers in Hackettstown and the immediate surrounding area. (RNJ Ex. 32, p. 5; TR 1749, 1752-53)

211. As President of RNJ and General Manager of Station WRNJ, Tighe has worked at the station on a daily basis since it went on the air in August 1976. (RNJ Ex. 32, p. 1; TR 1600) He has been responsible for regulatory compliance. In an effort to be aware of, and to comply with Commission requirements, he compiled a Legal Guide[107] and engaged in frequent consultation with legal and engineering counsel as well as the Commission Compliance Division staff concerning questions about station operation. (RNJ Ex. 32, pp. 1-2, TR 681, 1605)

212. Tighe had no prior experience in radio station sales before he began operating Station WRNJ. (RNJ Ex. 32, p. 1; TR 1601) He appointed the persons who have directed the station sales effort and he supervised the sales department activities. He has not always been involved with sales on a daily basis. (RNJ Ex. 32, p. 1; TR 1602)

213. In 1976, Tighe hired John Lingua to direct Station WRNJ's sales effort. Lingua, who had been involved in sales in New England, taught sales methodology to the station staff. (TR 1602-03) Lingua hired sales staff members in consultation with Tighe. (TR 1602)

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[106] Talada was Sales Manager in 1978 when the first sales package was distributed.

[107] The Station WRNJ Legal Guide is a large binder filled with releases by the Commission, the National Association of Broadcasters, Pike and Fischer, and other sources. (RNJ Ex. 32, pp. 1-2) Tighe developed the Legal Guide for use by the station sales and broadcasting staff. (TR 1605)

214. During Lingua's tenure, Tighe was involved in developing guidelines with respect to sales practices and presentations to advertisers. (TR 1603-04) He described Station WRNJ's operating data to the sales staff and explained why the station was daytime-only.[108] (TR 1603; RNJ Ex. 32, p. 1)

215. Tighe also established rates and wrote copy. (TR 1603, 1605) He reviewed advertisements and public service announcements.[109] (TR 1605)

216. As noted, *supra*, Sheldon Talada, Station WRNJ's Sales Manager in 1978, coordinated the production of the first sales package. (RNJ Ex. 30, p. 1) He and the sales staff relied on information the station had received from the Radio Advertising Bureau, the National Association of Broadcasters, MediaStat, Call Data Systems, Inc., and Peter Bardach in producing the sales kit. (RNJ Ex. 30, p. 1; TR 1734; RNJ Ex. 32, pp. 2-3) From these sources, and from information relating to power and coverage supplied by Tighe, Talada composed or arranged all of the written materials in the sales kit.[110] (RNJ Ex. 30, p. 1) As detailed, *infra,* Tighe was responsible for the color scheme, the graphic display and for choosing Bardach to prepare the CPM and it was he who reviewed the sales package to make sure it did not violate Commission standards for truthfulness and accuracy. (RNJ Ex. 32, p. 3; TR 1609, 1680)

217. Tighe arranged for the printing of the April 1978 sales package and selected its olive green color scheme. (RNJ Ex. 32, p. 2-3) He prepared the orientational map graphic that was included in the package. (RNJ Ex. 32, p. 3; Pillar Ex. 12, pp. 17A-18A)

218. In arranging the preparation of the graphic, Tighe enlisted the support of Brooks Hirsh, a photographer in Hackettstown. Tighe advised Hirsh that they were to produce a graphic that would not exaggerate the coverage of Station WRNJ. Tighe instructed Hirsh to use the station's calculated service contour design in as precise a manner as possible so that RNJ would not encounter problems with the Commission. Tighe was present and personally advised Hirsh during the preparation of the graphic. Tighe provided a copy of an engineering statement that included Station WRNJ's 0.5 mV/m calculated contour map on file with the Commission for its then 1 kw operation. (RNJ Ex. 44; Pillar Ex. 12, pp. 5, 59; TR 1645) Hirsh cut out an outline of the 0.5 mV/m contour and photographed it. He also photographed a road map of the area. (RNJ Ex. 32, pp. 3-4, 9-10)

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[108] The sales staff made it a practice to explain to clients that Station WRNJ was a daytime-only station. (TR 1737)

[109] He was concerned with the possibility of advertising clients using lotteries to increase their business. (TR 1604, 1750)

[110] Talada did not prepare the graphic representation of the station location, did not calculate the CPM, and did not choose the olive green color scheme. (RNJ ex. 30, p. 1)

219. After developing the negatives, Hirsh made prints of the road map. He placed the road map print on the easel of an enlarger. He also placed the negative of the contour map in the enlarger. By moving the enlarger mechanism up and down, Hirsh was able to coordinate the scale of the contour with the scale of the road map. He did this by selecting towns near the outer edge of the 0.5 mV/m calculated contour and using them as guidelines for placing the contour on the road map. (RNJ Ex. 32, p. 4)

220. Hirsh then superimposed the contour outline onto the photograph of the road map, using the white light in an effort to create a shadow effect around the outer edges that would approximate the fading of a radio signal. Hirsh's final product was a glossy photograph. (RNJ Ex. 32, p. 4; Pillar Ex. 12, p. 39; RNJ Ex. 33, p. 3) Tighe took the glossy photograph to Panther Valley Printers.[111] The printers used the glossy to create the orientational maps in the April 1978 sales package. They put the Station WRNJ call letters on the graphic near "Hackettstown," along with a bright green spot locating the station facilities slightly above the center of the page. It is not disputed that the lighter area exceeded the actual 0.5 mV/m calculated contour. (TR 1633; RNJ Ex. 32, pp. 4-6; RNJ Ex. 33, p. 3)

221. After using the map for three months, Station WRNJ(AM) replaced it in July 1978 because of the poor choice of color. (RNJ Ex. 32, p. 5; TR 1636)[112] Tighe noted that no advertiser or potential advertiser ever complained about or questioned the accuracy of the map. (RNJ Ex. 30, p. 3; RNJ Ex. 32, p. 2; TR 1634) Talada claimed that advertisers showed no interest in whether Station WRNJ's signal extended to outer areas of its 0.5 mV/m contour such as Somerville (south), Franklin (north), Bethlehem (west) and Morristown (east). (TR 1756)

222. Tighe explained that he designed the map as a background graphic to familiarize advertisers with the location of a relatively new station that was the only station licensed to Hackettstown, New Jersey. (RNJ Ex. 32, p. 3; Pillar Ex. 12, pp. 4, 18A) He maintained that he did not intend to produce a coverage map, although Station WRNJ salesperson did use the graphic for that purpose during the three months it was in use.[113] (RNJ Ex. 32, p. 3; TR 1740) Tighe claimed that he intended that the lightened area on the graphic not exceed the 0.5 mV/m calculated contour; that he prepared the graphic in good faith and designed it with an

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[111] While Tighe claimed that he at all times sought to maintain the accuracy of the graphic, he failed to compare the graphic with the map depicting the 0.5 mV/m contour. (TR 1633)

[112] As discussed, *infra*, Warren did not file its complaint regarding the map until July 1979. (Pillar Ex. 11, p. 3)

[113] Talada recalled that Tighe had told him, sometime after the graphic was prepared, that the intent was to have a coverage map to show advertisers. (TR 1746, 1756)

intent to avoid the possibility of misleading advertisers.[114] (RNJ Ex. 32, p. 3)

223. The written textual data set forth in the April 1978 sales package contained a cost per thousand efficiency analysis (CPM). This CPM showing read as follows (Pillar Ex. 12, p. 18):

WRNJ Radio 1000

Hackettstown, N.J.

Cost Per Thousand Efficiency Analysis

Total persons in basic "trading area":	**440,289**
Average radio sets-in-use 6 AM – 7 PM:	**17.9%**
Average number of persons listening to radio, average quarter hour 6 AM – 7 PM:	**78,812**
WRNJ RADIO average share of audience 6 AM – 7 PM	**17.4%**
Total WRNJ RADIO listeners, average quarter hour 6 AM – 7 PM	**13,713**
Average cost per thousand WRNJ listeners (based on typical cost of $6 per half minute commercial):	**$ .44**

Source Data:
Call Data Systems Inc. Trade Area Analysis Systems (20 mile radius). MediaStat Radio Audience Report — Summer 1977.

All data subject to statistical limitations of reporting services.

This CPM was prepared by Peter Bardach at Tighe's request.[115] (TR 1680-81) Bardach was at the time and is presently President of the licensee of Station WSUS(FM), Franklin, New Jersey.

224. Bardach had worked for over 20 years at major advertising agencies in New York City, leaving Foote, Cone and Belding as Vice President/Director of Broadcasting in 1975.[116] (RNJ Ex. 34, p. 1) All of Bardach's work in advertising was in the area of media buying. He bought advertising time on many radio stations of all sizes during those years. (TR 1688-89) Tighe relied on Bardach's advertising expertise in asking him to prepare materials for the sales kit. (TR 1639-40, 1741)

225. The sales kit also included a page headed "Hackettstown Service Area Demographics" which consisted of detailed demographic breakdown of the "20 mile trade area." (Pillar Ex. 12, p. 18) This information came from Call Data Systems, Inc. and was provided to Station WRNJ by David

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[114] Tighe attributed his inexperience in creating such a graphic as the reason for this error.

[115] Tighe asked Bardach to put together a cost per thousand efficiency analysis for presentation to advertising agencies and station representatives. (TR 1680-81)

[116] He continued to carry out his duties as Vice President/Director of Broadcasting on a consulting basis until 1977. (TR 1704-05)

Field, a friend of Tighe's.[117] (TR 1693) Station WRNJ's transmitter site was the center of the "trade area."

226. Bardach explained his methodology in developing the CPM analysis as follows:

(1) He took the population of the "20 mile trade area" as estimated in the Call Data material. He explained that he chose a 20 mile radius from the Station WRNJ transmitter site based on his experience in buying radio time at advertising agencies. According to him, a "rule of thumb" for 1000 watt AM stations was to use an estimate of total listeners within a 20 mile radius of the transmitter site. He acknowledged that while the 20 mile figure is not as accurate with a directionalized station, such as Station WRNJ[118], as with a non-directionalized station, analysis at the agencies had allowed them to assume that a 1000 watt AM station had coverage roughly equivalent to a 20-mile radius. (RNJ Ex. 34, p. 2) He admitted that twenty miles was "a somewhat arbitrary figure." (TR 1685-86) Before selecting that distance, Bardach did not consult any coverage map for the station or any other station files. (TR 1687)

(2) The figure for the average sets in use (17.9%) came from a report prepared by MediaStat, a broadcast rating firm.

(3) The average number of persons listening to radio was derived by multiplying the first two figures [440,289 × 17.9% = 78,812].

(4) Station WRNJ's average share of audience (17.4%) came from a MediaStat survey conducted in June, 1977. (TR 1695) The communities surveyed were Blairstown, Hackettstown and Belvidere, New Jersey. The survey did not cover the entire "20 mile trade area." (TR 1694) The population of the area surveyed, age 12 and older, was 26,800. (Pillar Ex. 12, p. 35) In contrast, the 1970 population for the "20 mile trade area," age 14 and older, was 275,844.[119] The actual number of persons surveyed by MediaStat was 206.

(5) The figure for the total Station WRNJ listeners for an average quarter hour (13,713) was derived by multiplying (i) the average number of persons in an average quarter hour listening to radio throughout the entire 20 mile trade area and (ii) Station WRNJ's share of the audience in the much smaller and much less populous Blairstown-Hackettstown-Belvidere area. [78,812 × 17.4% = 13,713]. Essentially, this calculation presumed that throughout the "20 mile trade area" Station WRNJ garnered the same share of the audience as it did in the

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[117] Field had also provided demographic data for the areas within (1) a 10 mile radius of the transmitter site and (2) a 15 mile radius of the transmitter site. (TR 1276-80; Pillar Ex. 12, pp. 63-76, 84-85) However, Tighe did not consider using the demographic data for the 10 and 15 mile radius on the sales bid. (TR 1657-58; Pillar Ex. 12, pp. 63-76)

[118] Bardach knew that Station WRNJ operated with 2 towers and that its pattern would not be too highly directionalized. (TR 1707-08) This coupled with Station WRNJ(AM)'s position in the middle of the AM dial (AM stations at the top of the dial have less coverage), gave Bardach reason to believe he was making valid use of an accepted advertising industry procedure. (TR 1692-93)

[119] This figure was derived from the demographic data for the "20 mile trade area" included in the Station WRNJ sales kits. (Pillar Ex. 12, pp. 18, 34) The numbers of persons age 6 and under (43,102) and age 6-13 (67,854) were subtracted from the total 1970 population of 386,871.

Blairstown-Hackettstown-Belvidere area, even though (i) Hackettstown is Station WRNJ's community of license and the other two communities are nearby and receive a strong signal from the station[120], (ii) portions of the "20 mile trade area" are beyond even the calculated 0.5 mV/m contour of Station WRNJ,[121] and (iii) the population of the area MediaStat surveyed was only approximately 10 percent of the "trade area." Bardach conceded that he had no specific research data to support his conclusion that Station WRNJ enjoyed a 17.4% share of the audience over the entire "trade area." (TR 1697)

(6) The final figure, the cost-per-thousand, was derived by dividing the cost of a half-minute commercial into the number of persons (in thousands) purportedly listening to Station WRNJ in an average quarter hour. [$6.00 ÷ 13,713 = .44].

227. When Bardach prepared the CPM, he knew that the MediaStat survey did not cover the entire trade area. (TR 1695, 1700) However, he believed it was appropriate to apply the 17.4% average listenership for the MediaStat survey area to the entire trade area and believed that 13,713 represented a reasonable approximation of Station WRNJ's average listenership in the trade area. (TR 1695-1700)

228. In looking at the areas within the trade area, but outside the area surveyed by MediaStat, Bardach saw no reason to assume that Station WRNJ's average listenership would vary to any statistically significant degree from the surveyed area. According to Bardach, there were no radio stations in the non-surveyed areas more competitive to Station WRNJ's audience share than existed in the surveyed area. (TR 1697-1700) Bardach claimed that he was familiar with all of the stations in those areas through his knowledge of the area and his position as a New Jersey broadcast licensee. (TR 1700; RNJ Ex. 34, p. 1)

229. Tighe did not question the use of a 20-mile trade area because of his confidence in Bardach's advertising expertise. (TR 1614, 1656) Although he knew that, as a directional operation the 0.5 mV/m contour did not extend 20 miles in all directions, he believed the 20-mile trade area to be a conservative estimate of actual station coverage. (TR 1624-25)

230. The "WRNJ Fact Sheet," which was part of the April 1978 sales package, incorrectly represented that the "latest population projection for Warren County (home county) alone, forecast 477,654 persons in the year 1982." RNJ acknowledged that the statement was inaccurate. That figure corresponded to the projected 1982 population of the "20 mile trade area," referred to in the sales kit. (RNJ Ex. 30, p. 2; TR 1621) The projected 1982 population of Warren County was substantially lower. (Pillar Ex. 11, p. 3)

231. The incorrect population estimate was an inadvertent transposition of the estimated trade area population to Warren County. (RNJ Ex. 32, p. 7) The population estimate was correctly identified on another page

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[120] Belvidere and Blairstown were within the calculated 2.0 mV/m contour (RNJ Ex. 44) and the measured 0.5 mV/m contour. (Pillar Ex. 17)

[121] RNJ Ex. 44.

in the package as that of the trade area. (Pillar Ex. 12, pp. 18A, 34) Sheldon Talada made the mistake in preparing the April 1978 package. (RNJ Ex. 30, p. 2) No advertiser mentioned the mistake to RNJ although the mistake was an obvious one. (TR 1780-81) Worth and Talada claimed that the page on which the mistake was made was ineffective in dealing with advertisers. (TR 1742, 1765, 1780-81)

232. The sales kit failed to disclose that Station WRNJ is a daytime-only station. Additionally, the representation that RNJ conservatively limited its trade area to 20 miles and that this area was "far less than our one-half millivolt prime coverage area" was not accurate. The calculated 0.5 mV/m contour of Station WRNJ did not extend 20 miles in all directions. (RNJ Ex. 44) An area to the east of Hackettstown lies within the 20 mile circle but beyond the calculated 0.5 mV/m contour. A smaller area to the south also is situated within the 20 mile circle but beyond Station WRNJ's calculated 0.5 mV/m contour. To the north and west, Station WRNJ's calculated 0.5 mV/m contour extends well beyond the 20 mile circle.[122] (RNJ Ex. 44)

233. It was also represented that the "total market size in primary coverage area is 440,289." This figure represented the estimated 1977 population of the "20 mile trade area." (Pillar Ex. 12, p. 18) According to RNJ's construction permit application for the facilities then in use, the 1970 population of its primary service area[123] was 286,313. (Pillar Ex. 12, p. 60) The 1970 population of the "20 mile trade area" was 386,871 (Pillar Ex. 12, p. 18), approximately 35% larger than the 1970 population of the station's primary service area. Tighe explained that for the purpose of the sales kit, the concepts of "trade area" and "primary coverage area" were used synonymously. (TR 1615) As noted, *supra*, Tighe knew that, because Station WRNJ was a directional station, its 0.5 mV/m signal did not extend 20 miles in all directions. (TR 1625)

234. Bardach explained that it was also standard advertising agency practice to refer to the 20-mile trade area as the primary coverage area or primary service area for a 1000 watt AM station like Station WRNJ. (TR 1611, 1691, 1704-06) He was unaware that "primary" coverage or service might mean something different in an engineering or technical context. The word "primary" was a carryover from the print media. (TR 1705-06)

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[122] More specifically, the trade area included two areas, in the southeast and southwest nulls, not within the 0.5 mV/m contour. Large areas within the station's major lobe to the north and west of Hackettstown, including the population centers of Phillipsburg and Somerville, New Jersey, and Easton, Pennsylvania, were not in the trade area. (RNJ Ex. 31, p. 3; RNJ Ex. 44; TR 1660) Station WRNJ's 0.5 mV/m contour extends much farther than the 20-mile trade area radius in some directions. (RNJ Ex. 31, p. 2; RNJ Ex. 44; TR 1660, 1776)

[123] That is, the population residing within its 0.5 mV/m contour, less communities of 2500 or more which did not receive at least 2.0 mV/m service.

235. Both Tighe and Talada maintained that the RNJ sales staff made almost no use of the trade area concept or data because they found that local advertisers were uninterested.[124] (TR 1659, 1742, 1765)

236. As noted, *supra*, RNJ distributed this first sales package to advertisers in Hackettstown and surrounding towns during a three month period. (TR 1752-53; RNJ Ex. 32, p. 5) By July-August 1978, the Station WRNJ(AM) sales staff made no use of this olive green package. (TR 1772; RNJ Ex. 31, p. 1)

237. Sheldon Talada, the Station WRNJ(AM) Sales Manager in 1978, claimed that during the three months RNJ distributed the olive green sales package, advertisers were basically interested in rates. (TR 1742) He maintained that, in retrospect, it would have been sufficient for the station's purposes to simply have used a well-presented rate sheet.[125] (TR 1743) He expressed the view that while some advertisers were interested in a little information about the station and its general service area, the most effective sales tool was the rate sheet.[126] (TR 1742-43)

(b) Station WRNJ's Second Sales Package - July 1978

238. It was decided that the olive green color of the first sales package was not acceptable and the sales package needed to be more professional in appearance. (RNJ Ex. 30, p. 2) RNJ prepared a second sales package that was printed in July 1978. (TR 1641, 1748; RNJ Ex. 32, p. 5)

239. In the second sales package, RNJ retained the written textual material from the first package, including the CPM prepared by Bardach.[127] However, a different color scheme and different graphics were utilized. The second sales package also included a coverage map that consisted of an outline of Station WRNJ's 0.5 mV/m calculated service contour as shown in Station WRNJ's application for the facilities it was

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[124] By late 1978, the RNJ sales staff believed Station WRNJ's audience share was much larger than 17.4% and they, therefore, made little use of the MediaStat date listed in the April 1978 sales package. (TR 1770-71; RNJ Ex. 31, p. 3) The sales staff found that the CPM data was not effective with the potential advertisers they called upon. (TR 1742)

[125] Tighe maintained that over 90% of Station WRNJ(AM)'s advertising sales were made in Hackettstown. That is where the station sales staff concentrated its efforts. (TR 1617)

[126] Talada acknowledged that advertisers were interested in knowing where the signal was and where the station's potential listeners were. (TR 1742) Peter Bardach, who assisted in the preparation of the promotional materials, explained that Tighe asked for his assistance in preparing information useful to advertising agencies and station representatives. (TR 1680-81)

[127] Tighe acknowledged that the textual material was not checked for accuracy prior to the preparation of the second sales kit. (RNJ Ex. 30, p. 2; TR 1627) As detailed, *infra*, the only major changes were in the graphics, the color scheme, and the substitution of a coverage contour map for the "orientational map" used in the first sales kit. The graphics arts firm produced the contour map in conjunction with Tighe. (RNJ Ex. 30, p. 2)

operating. (RNJ Ex. 30, pp. 2-3; RNJ Ex. 32, pp. 3, 6-7; RNJ Exs. 34 and 44; Pillar Ex. 12, pp. 5, 19A, 30 59; TR 1645)

240. In the July 1978 sales package, Radio replaced the orientational map with a contour map outlining the 0.5 mV/m calculated service contour with a number of towns identified in their respective locations. (RNJ Ex. 32, p. 6; Pillar Ex. 12, p. 27; RNJ Ex. 31, p. 12) The contour map page clearly labelled the contour as the 0.5 mV/m calculated service. (RNJ Ex. 31, p. 12) The graphics for the coverage map in the July 1978 sales kit were done by John Murray Associates of Hackettstown with Tighe's assistance. (RNJ Ex. 32, p. 6) Station WRNJ(AM) has continued to use the July 1978 map, with the minor addition of two towns in 1980, in its promotional materials. (RNJ Ex. 31, pp. 1-2)

241. Tighe explained that the "orientational map" was replaced with a coverage map, not because of the inaccuracy of the first map but rather because "the graphics were terrible." (TR 1636) He claimed that the main purpose of preparation of the second sales kit was to change the graphics. (TR 1641)

(c) The August 22, 1979, November 1, 1979 and February 26, 1980 Ginsburg Letters

242. On July 25, 1979, the Warren Broadcasting Corporation (Warren) filed a complaint with the Commission concerning Station WRNJ's first and second sales packages. (Pillar Ex. 11, pp. 3-6) Warren was the licensee of Stations WCRV(AM), Washington, New Jersey and WFMV(FM), Blairstown, New Jersey. Warren complained about certain factual information in both the April 1978 and July 1978 Station WRNJ sales packages and the "coverage map" in the April 1978 sales package.[128] (Pillar Ex. 12, pp. 3-6)

243. RNJ was informed of the complaint when it was transmitted to it as part of a Commission Complaints and Compliance Division letter of inquiry dated August 22, 1978 and signed by Arthur L. Ginsburg, the then Chief of the Complaints and Compliance Division of the Broadcast Bureau. RNJ was asked to comment on Warren's allegations that Station WRNJ's sales kits evidenced "a pattern of distortion, half-truths, and misleading statements." (RNJ Ex. 32, p. 7; Pillar Ex. 11, p. 3; TR 1767)

244. Warren complained about the following aspects of the Station WRNJ sales kits:

(a) the coverage map included in the first sales kit referred to, *supra*, as the "orientational map". Warren noted that the light area exceeded the 0.5 mV/m contour as depicted in the coverage map included in the second sales kit;

(b) the references to the 20 mile trade area;

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[128] At the time of the complaint, the April 1978 sales package had not been used by RNJ for approximately a year. (Pillar Ex. 11, p. 3; RNJ Ex. 32, P. 5)

(c) the cost efficiency analysis;

(d) the supposed projected 1982 population for Warren County. Warren noted that The Sales & Marketing Management's *Survey of Buying Power 1978* projected that Warren County's 1982 population would be 86,100;

(e) that Station WRNJ had a staff meteorologist;

(f) that Station WRNJ implied that the 1977 MediaStat audience study covered all of Warren County, when in fact it covered only a portion of the County,[129] and

(g) Station WRNJ's assertion that it is the only station in Warren County affiliated with two networks, noting that Station WCRV had been affiliated with two networks since November 1978. (Pillar Ex. 11, pp. 3-5)

245. Upon receiving the complaint, Tighe informed Worth, the staff member with primary responsibility for sales. Worth also reviewed it. (TR 1764, 1767; RNJ Ex. 31, p. 1) Tighe and Worth discussed the complaint. (TR 1764) Tighe directed Worth to modify all of the pages in the sales package that were the subject of the complaint. (RNJ Ex. 31, p. 1; RNJ Ex. 32, p. 7; TR 1762) Upon reviewing the July 1978 sales package in use at the station at the time of the complaint, Worth decided that most of the pages were unnecessary and they were removed. The exceptions were the cover sheet, the rate sheet and the contour map page. (RNJ Ex. 31, p. 1; TR 1762)

246. RNJ has not distributed any copies of the July 1978 sales package since it received the Warren complaint in August 1979. (RNJ Ex. 32, p. 7) Since that time, RNJ has normally used only the July 1978 cover sheet, contour map and rate card, sometimes together with a cover letter tailored to a particular advertiser, as its promotional materials for distribution to advertisers.[130] (RNJ Ex. 31, p. 1)

247. RNJ responded on September 18, 1979. It disputed Warren's characterizations of Station WRNJ's promotional materials, stating, "While the materials may not always be entirely consistent with optimal Commission specifications for promotional materials and while they do contain an inadvertent instance of mis-categorization, they are straightforward and accurate." (Pillar Ex. 12, p. 3) It asserted that the map included in the first sales kit was only "an orientational tool to acquaint advertisers with the new station's general location." It noted that the lightened area was generally concentric with the calculated 0.5 mV/m service contour of Station WRNJ. (Pillar Ex. 12, p. 5)

248. RNJ, in its response, also defended its use of the "20 mile trade area" as "not inappropriate." Radio asserted that the "trade area" was an

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[129] Warren questioned the application of the 17.4% average share of the entire trade area population, noting that the MediaStat survey covered only a portion of the trade area.

[130] Although Warren had complained about its use, Worth did not remove the page containing the demographic information as to Station WRNJ's "20 mile trade area" until a month later. (RNJ Ex. 31, p. 1; TR 1764-65)

accepted marketing concept used by broadcast and print media. While conceding that the station's 0.5 mV/m contour did not include communities in Morris County that were within the "20 mile trade area," it stated that the trade area did not constitute a "gross exaggeration" of Station WRNJ's service area, as Warren's complaint alleged. Station WRNJ explained that: "Use of the trade area concept was also dictated by the enormous difficulties and expense associated with obtaining statistically valid ratings and demographic data for Station WRNJ's entire primary service area." It concluded that "use of the 20-mile trade area statistics seems a reasonable compromise." (Pillar Ex. 12, pp. 6-7)

249. Regarding Station WRNJ's "Cost Per Thousand Efficiency Analysis," RNJ conceded that its combination of data from the Call Data Systems and MediaStat materials in one formula was "inappropriate." It asserted that while it may have been guilty of oversimplification, it was not guilty of fabrication. Regarding the matter of network affiliations, Radio noted that Station WCRV did not become affiliated with two networks until after Station WRNJ's promotional materials were prepared. (Pillar Ex. 12, p. 10)

250. In a letter dated November 1, 1979, Ginsburg stated that, upon review of the complaint and RNJ's reply, it was concluded that Station WRNJ's coverage map, "Efficiency Analysis," and population projection were "misleading and inaccurate." Ginsburg "strongly admonished" RNJ for its "failure to adhere to the Commission's policy regarding use of information which tends to be deceptive." Ginsburg alerted RNJ that it would be expected "to assure that such violations of Commission policy are not repeated." (Pillar Ex. 13, p. 4) Ginsburg stated further that the Commission did not agree that Station WRNJ's use of demographics based upon a 20 mile trade area was a "reasonable compromise" dictated by the expense and difficulty in obtaining statistically valid data for Station WRNJ's primary service area:

> The population totals and percentages shown in the chart labelled "Hackettstown Service Area Demographics (WRNJ), Summary for 20-Mile Trade Area," fail to indicate that such statistics do not represent the station's present actual coverage. Use of the chart in its present form without qualification falls short of the Commission's policy prohibiting use of promotional material which is not based upon demonstrable facts or which tends to mislead advertisers.

The letter concluded that while no further Commission action was contemplated on the basis of the information then available, the licensee would be expected "to assure that all your promotional material meets the requirements of Commission policy." (Pillar Ex. 13, p. 5)

251. In a letter dated December 4, 1979, RNJ requested reconsideration of the admonishment assessed in Ginsburg's November 1, 1979 letter. Tighe, among other things, took exception to the conclusion that the map in the first sales kit was inaccurate, asserting that the map's "sole

purpose" was to orient prospective media buyers to Station WRNJ's geographic location. (Pillar Ex. 14, p. 2)

252. On February 26, 1980 Ginsburg responded. With respect to the map, he stated (Pillar Ex. 15, p. 2):

> Although not labelled as a "coverage" map, the inclusion of the map, generally outlining the contours of WRNJ's coverage area, has the likelihood of leading advertisers to believe that the map accurately portrays the station's contours. While it is true that there is close congruity between the map and the station's contours, the lighted area extends beyond the calculated contours in Sussex, Morris, and Somerset Counties, including such cities as Bound Brook, Manville, Sussex, and Tabor, which are not within the station's coverage area. Although no intent to mislead advertisers was found, the map in question tended to be deceptive and thus fell short of the standard of accuracy required of licensees.

The letter concluded by stating that no further action was warranted. (Pillar Ex. 15, p. 3)

253. Shortly after Radio received the Commission's August 22, 1979 letter, Tighe directed Norman Worth, who at the time had primary responsibility for the station's sales, to make corrections on all of the pages in the sales kit that were covered by the complaint. In order to avoid an unprofessional appearance, Worth decided to remove the pages rather than write over them with corrections. Accordingly, he removed, among others, the pages containing the "WRNJ Fact Sheet," and the "Cost Per Thousand Efficiency Analysis." He did not remove, however, the page containing the demographic information for the "20 mile trade area" or the page depicting the 0.5 mV/m calculated service contours. At some later time, Worth reviewed the edited version of the sales kit and decided that some of the pages were unnecessary. He then removed three pages, including the page containing the demographic detail for the "20 mile trade area." RNJ continued to make use of the contour map. In 1980, Worth had a graphic artist change the background color of the contour map and add the communities of Belvidere and Phillipsburg inside the 0.5 mV/m calculated contour. With that alteration, the contour map continued to be used through the time of the hearing. (RNJ Ex. 31, pp. 1-2)

(d) Tighe's Knowledge of Station WRNJ Measurement Data

254. At the times the first and second sales kits were prepared, RNJ had available to it field intensity measurements of Station WRNJ's signal. Those measurements were submitted to the Commission as part of Station WRNJ's application for a license to cover its construction permit, as modified.[131] The license application (File No. BL-14,197) was granted February 14, 1977. These field intensity measurements were taken along

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[131] A contour map, based on these measurements, was not filed as part of the proof of performance. The only contour map on file with the Commission was the 0.5 mV/m calculated contour. (TR 1645; RNJ Ex. 44; Pillar Ex. 12, p. 59 and Pillar Ex. 16)

eight radials, 10, 50, 95, 105, 205, 250, 290, and 330 degrees. On only one radial, 290 degrees, did Station WRNJ put a signal as strong as 0.5 mV/m out as far as 20 miles. According to those measurements, Station WRNJ's measured 0.5 mV/m contour would have fallen on the other radials at or between the following distances from the transmitter site: 10 degrees, 19.0 miles; 50 degrees, slightly beyond 14.7 miles; 95 degrees, between 4.2 and 5.0 miles; 105 degrees, between 7.4 and 8.8 miles; 205 degrees, 8.5 miles; 250 degrees, slightly beyond 15.9 miles and 330 degrees, between 16.8 and 18.9 miles. (Pillar Ex. 16, pp. 8-16)

255. A map based upon the measurement data had been prepared by Station RNJ's consulting engineer. (Pillar Ex. 17, p. 3) The engineer's records indicate the map was sent to Tighe on September 9, 1976. (Pillar Ex. 17, p. 1) The area encompassed within the measured 0.5 mV/m contour was much smaller than the area within the calculated 0.5 mV/m contour. (TR 1644) This measured contour map established that Stroudsburg, Easton, Chester, Branchville, Franklin and Somerville all are situated beyond the 0.5 service contour.[132] (Pillar Ex. 17, p. 3)

256. Tighe could not recall requesting that the measured contour map be prepared. However, he was "pretty sure" he must have been the one who ordered it. (TR 1644) Tighe claimed that he was not aware of this when the sales kits were prepared and only learned of its existence at the discovery phase of this proceeding when it was found in one of the station's inactive files.[133]

257. At the times the sales kits were prepared, Tighe was aware that signal strength measurements for Station WRNJ existed. He had participated in the process of taking measurements and assembling the measurement data to be sent to Station RNJ's consulting engineer. (TR 1643, 1647, 1717)

258. Prior to this proceeding, RNJ never considered or discussed the use of measured, rather than calculated, contours in its promotional materials. (TR 1663, 1721, 1776) It was explained that RNJ was of the view, based on personal listening and contact with advertisers by staff members, that even the calculated 0.5 mV/m contour often understates the coverage of Station WRNJ. According to Worth, the station can be heard at the Allentown, Pennsylvania airport, in Scranton, Pennsylvania, and in Plainfield and Franklin, New Jersey, all outside the 0.5 mV/m calculated service contour.[134]

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[132] Each of those communities is depicted in the sales kit coverage map as being within the calculated 0.5 mV/m contour. (Pillar Ex. 12, p. 27)

[133] Tighe was the custodian of that file. (TR 1645-48, 1671, 1778)

[134] According to Worth, an RNJ principal involved in Station WRNJ(AM) sales since 1978, he has listened to the station at least 20 miles from the transmitter in all directions north, south, east and west. (TR 1776)

259. RNJ acknowledged that, in its sales packages, it has always used the Station WRNJ 0.5 mV/m calculated service contour shown in its application on file with the Commission for the facilities it was operating, rather than measured contours. (RNJ Ex. 44; Pillar Ex. 12, pp. 5, 59; TR 1645, 1650) It never occurred to Tighe to use anything except the Station WRNJ 0.5 mV/m calculated contour that RNJ had filed with the Commission. Tighe was not aware then, and is not aware now, of any Commission policy requiring that maps used for advertising or promotion show measured contours.[135]

260. Station RNJ's consulting engineer, Joseph S. Sherman, noted that AM signal strengths may vary from day to day. He explained that measurements taken during the winter months generally are higher than the same measurements taken during the summer months. However, he knew of no set of measurements that indicated that Station WRNJ put a 0.5 mV/m signal out twenty miles in all directions. (TR 1717-18) Nor was he aware of any data that reflected as much as a two to one variance in Station WRNJ's signal strength between summer and winter. (TR 1721)

Ultimate Findings and Conclusions

1. Pillar of Fire (Pillar) seeks a grant of its application for renewal of the license of Station WAWZ(FM), Zarephath, New Jersey. Radio New Jersey (RNJ) has filed a mutually exclusive construction permit application for a new FM station utilizing the same frequency in neighboring Somerville, New Jersey.[136] There are no outstanding disqualifying issues relative to either of the applicants and, therefore, it is appropriate to resolve the question as to which of the proposals would, on a comparative basis, better serve the public interest.

2. Both the Commission and the courts have recognized that in a proceeding involving a renewal applicant and a mutually exclusive permit applicant, the incumbent licensee's past performance affords the Commission the strongest and most reasonable basis for determining whether the public interest will be served by the renewal of its license.[137] The courts have endorsed the Commission's practice of according primary significance to this factor of past performance in a comparative renewal proceeding and have indicated that a licensee who has rendered meritorious or substantial service can be reasonably confident of renewal. Stated

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[135] As noted by RNJ, Ginsburg, in his letters, stated no objection to RNJ's use of a calculated 0.5 mV/m contour, rather than a measured contour.

[136] The Commission ruled that the existing record did not justify the designation of a Section 307(b) issue. The choice between these two applicants must rest upon a comparative evaluation of their proposals.

[137] *Citizens Communications Committee v. Federal Communications Commission*, 447 F.2d 1201, at 1208 (D.C. Cir. 1971); *Simon Geller*, 90 FCC 2d 250, at 270 (1982); *Broadcast Communications, Inc.*, 93 FCC 2d 1162 (Rev. Bd. 1983).

simply, a licensee "runs on its record," and such licensee's legitimate renewal expectancy attaches when it has shown that its past performance has been meritorious or substantial. The Commission has stressed that a substantial record of service is to be translated into a comparative preference to be weighed against the other comparative factors and that this preference is entitled to more weight than "structural factors," such as integration and diversification. *Radio Station WABZ, Inc.*, 90 FCC 2d 819, 831 (1982), *affirmed, Victor Broadcasting, Inc.*, 722 F.2d 756 (U.S.C.A., D.C. Cir. 1983). The Commission has made clear that it is appropriate for a renewal applicant with a record of substantial performance to win over a challenger with preferences relative to integration and diversification. For this reason, it is appropriate to consider the broadcast performance of Station WAWZ(FM) during its license period, June 1, 1978 through May 31, 1981.

3. It is ruled, for the reasons set forth, *infra*, that the record in this proceeding warrants concluding that the past performance of Station WAWZ(FM) has been substantial. During the license period, management level employees of Station WAWZ(FM) conducted an ongoing ascertainment of the needs and problems of the station's service area by consulting community leaders and members of the public throughout a ten-county area and, as detailed in the findings, addressed the ascertained problems and needs in its non-entertainment programming.

4. Station WAWZ(FM) exceeded its 1978 programming proposals for non-entertainment programming in all categories. It devoted 491 minutes (6.42%) to news in contrast to its promise of 360 minutes (4.76%). Similarly, its public affairs programming of 283 minutes (3.72%) exceeded its proposal of 180 minutes (2.38%). Lastly, its "other" non-entertainment programming represented 53.93% (4,122 minutes) of its total broadcast schedule, whereas it had proposed to devote 51.58% (3,900 minutes) to this category.

5. RNJ places great stress on the fact that Pillar broadcast no daily local news programs and no regularly scheduled locally produced public affairs programs during its license period. However, Station WAWZ(FM) broadcast "UPI World News" on a regular basis between 12 and 15 times a day at the top of the hour for four or five minutes. Additionally, Station WAWZ(FM) broadcast weather reports following the "UPI World News" broadcast and timely notified the public of school, government office and court closings or postponements due to inclement weather. Its weekly program, "Regional News Review," prepared by a Station WAWZ(FM) staff member, provided a weekly summary of the news in Somerset and

adjoining counties.[138] "Community Bulletin Board," produced by Station WAWZ(FM) throughout the license period, broadcast announcements regarding cultural, civic, educational, governmental and religious activities throughout the service area. This program was aired for 10 minutes Monday through Friday.[139] This is in contrast to the performance of *Simon Geller*, cited, *supra*, where only one percent of the broadcast schedule was devoted to non-entertainment programming and where no renewal expectancy was awarded.

6. While Station WAWZ(FM) did not carry any regularly scheduled locally produced public affairs programs,[140] it did devote 3.72% of its broadcast time to this type of programming. The contention of RNJ that Pillar's reliance on "institutionally-produced" and nationally distributed public affairs programs left "virtually untouched" the needs and interests of concern to Zarephath and Somerset County is rejected. The findings (paras. 81-82) establish that the "Rutgers University Forum" program addressed the ascertained problems and needs of the area of New Jersey served by Station WAWZ(FM). This program originated at Rutgers University, New Brunswick, New Jersey, a distance of less than ten miles from the Station WAWZ(FM) studios. Most important, this program dealt extensively with the subjects of crime, education, taxes, housing, transportation, government, employment, the economy, the environment, politics and the elderly, all of which were matters of concern to listeners of Station WAWZ(FM). This program addressed specific topics which Station WAWZ(FM) had ascertained were problems of concern to its listeners and, most significantly, as they impacted on New Jersey residents. Similarly, other public affairs programs, such as "UPI Round Table," "Conversations in Chicago," "Keys To Better Living," and "The Added Years," were public affairs programs broadcast on Station WAWZ(FM) which addressed the needs and problems of the people in the area served by Station WAWZ(FM). "Rutgers University Forum," "UPI Round Table" and "Conversations in Chicago" provided listeners with special guest interviews of concern to the service area and provided analytic news reports of significant events and issues.

7. The Review Board has noted that the analysis of a licensee's response to the needs and problems of its service area should focus on the licensee's overall program service rather than on isolated aspects of programming, such as the source of certain programs or the program

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[138] During 34 weeks of the license period, including three months in late 1978 and early 1979, this program was not broadcast because of the absence of the staff member who prepared the program.

[139] In 1980, this program was broadcast for 15 minutes on Monday, Wednesday and Friday.

[140] Pillar broadcast locally produced public affairs programs on eight occasions during the license period for a total of 227 minutes.

format used to address the needs and problems. *Broadcast Communications, Inc., supra*. The Commission has expressly recognized that non-locally produced programs can be responsive to ascertained problems and needs. *Doubleday Broadcast Co.*, 88 FCC 2d 1181, 1191 (1982). It is ruled that Station WAWZ(FM) has met this test and that its extensive public affairs and limited news programming were responsive to the needs of its service area.

8. Pillar acknowledged that it did not sell commercial time to candidates for public office, including federal office, during the license period, explaining that it did not sell commercial time and had no rate card and that these officials, apparently aware of the status of Station WAWZ(FM), did not request time because they felt it was not something with which the station wished to become involved.[141] Pillar further explained that it was not the policy of the station to follow political elections on "a day-to-day basis." While Station WAWZ(FM) provided no campaign coverage or timely election results to its listeners, the weekly "Regional News Review" program furnished coverage of the 1978 U.S. Senate primary and election contests and information relative to registration for the 1979 and 1980 elections. Additionally, the "Rutgers University Forum" covered state-wide primaries and elections. The Commission has indicated that while there is no statutory requirement that a licensee make its facilities available to specific candidates, it expects its licensees to make reasonable good faith judgments as to what coverage is to be given. *Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 FCC 2d 1079, 1087-88 (1978). Although the political coverage provided by Station WAWZ(FM) was minimal in scope, it does not warrant a conclusion that Pillar did not exercise "reasonable good faith judgment" in the exercise of its licensee discretion under the particular facts present. *New Primer on Political Broadcasting and Cablecasting*, 69 FCC 2d 2209, 2222 (1978).

9. There is no dispute that Section 315(a) places an affirmative obligation on a licensee to afford reasonable opportunity for the discussion of conflicting views on issues of public importance. RNJ vehemently contends that Station WAWZ(FM) was remiss in its obligation. This contention is rejected. Not only did RNJ fail to establish that the various matters cited by it were "controversial issues of public importance," but it also failed to establish that the issues were not addressed by Station WAWZ(FM). The findings demonstrate that the various "controversial issues" were the subject of discussion and exploration during a number of the programs broadcast over Station WAWZ(FM). As detailed in the findings (paras. 81-84, 88-89), the "Regional News Review," "Rutgers

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[141] The Bodman letters (paras. 76-79), sent at the request of an RNJ principal, did not specifically request air time for the candidate.

University Forum," "UPI Round Table," "Keys to Better Living" and "Conversations in Chicago" addressed issues which were of concern to the listeners of Station WAWZ(FM). More particularly, the "Regional News Review" and the "Rutgers University Forum" programs dealt with such matters of local concern as legislation relative to Sunday blue laws, the upgrading of a local commuter rail system, parking meter and bus and train fare increases, the Port Authority strike, education bond issues, mandatory sex education and a host of other local concerns. As ruled, *supra,* Pillar fulfilled its obligation to program to meet the needs of its service area.

10. RNJ's claim that Pillar intentionally excluded programming directed to religious denominations with which it had fundamental doctrinal differences is not supported by the record. The findings (paras. 102-131) set forth the facts relative to Pillar's relationship with the Catholic Church and Jewish religious leaders.[142] Rev. Lawrence related his unsuccessful efforts to have rabbis broadcast on the station. Father Wieciek related his efforts to have some Catholic programs placed on the station. However, the record establishes that Station WAWZ(FM) aired 96 public service announcements (PSAs) for the U.S. Catholic Conference, 46 for the Catholic Relief Services and 179 for the Franciscan Fathers; carried a weekly 15 minute program produced by the Maryknoll Fathers; and carried PSAs and notices on the "Community Bulletin Board" for a number of local Catholic organizations. It is ruled that RNJ's contention that Pillar did not provide a "fair break" to denominations with which it had fundamental differences is belied by the record evidence and rejected.

11. Seven public officials and 24 members of the general public expressed the view that Station WAWZ(FM) served the needs of its listening audience through its non-entertainment programs, both public affairs and religious programs.[143] Many cited the various public affairs programs as their reason for concluding that Station WAWZ(FM) was an effective local outlet addressing contemporary problems. Others cited the religious programs as strengthening the traditional moral values of home,

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[142] The "World Jewish Broadcasting Network" incident detailed in paragraphs 107-115 of the findings does not adversely reflect on Pillar. The actions of David Field and the involvement of an RNJ principal, Tighe, border on the unethical and immoral. These activities were improper and reflect adversely on RNJ, resulting in the assessment of a slight-to-moderate comparative demerit.

[143] Some of these individuals expressed appreciation for the station's musical programs. No decisional significance is attributed to this aspect of their testimony, since the focus is on the station's role in meeting the needs and problems of the service area through non-entertainment programming. This case is distinguished from *Simon Geller, supra,* where the public witnesses' support of the licensee rested solely on its entertainment programming.

family and country.[144] It is not necessary to resolve the question raised by RNJ as to whether awarding a comparative preference for past performance based, in large part, on religious programs would be constitutionally permissible, since the holding that the past performance of Station WAWZ(FM) was substantial rests upon its public affairs programming and is exclusive of any consideration of its religious programming.[145]

12. The Commission, in *Radio Station WABZ, Inc., supra,* made clear that a station's reputation in the community as a local outlet evidences a licensee's commitment to serving the community. The court, in stressing that the "touchstone allowing for a renewal expectancy" must be a benefit to the public, ruled that the testimony of local leaders and the public is appropriately considered in making such a determination.[146] In summary, the community leaders and members of the public, who are in a unique position to know what the station has accomplished under the pressures and demands of day-to-day operation, have attested to the quality of service rendered by Station WAWZ(FM). The record evidence warrants characterizing such service as "sound, favorable, and substantial"[147] and concluding that Pillar, as the licensee of Station WAWZ(FM) merits a strong preference for its past performance.[148]

13. It is now appropriate to consider the comparative factors of diversification of the mass media and the integration of ownership and management into the day-to-day operation of the station. The Commission has stated in the past that the objectives of maximum diffusion of control over the media of mass communications and the best practical service to the public (integration) are objectives to be given careful consideration.

14. Turning to the comparative factor of diversification, it is noted that Pillar is the licensee of standard broadcast Station WAWZ(AM). This station, which is licensed to Zarephath, New Jersey, and operates 31 hours a week under a share-time agreement with Station WBNX, New York, serves approximately 37% of the area within Station WAWZ(FM)'s 1

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[144] RNJ's claim that these 31 individuals do not represent a cross-section of the public is not supported and is contrary to the record evidence which establishes that they come from disparate walks of life and backgrounds.

[145] The conclusion that the past broadcast operation of Station WAWZ(FM) was substantial is buttressed by the station's performance in the areas of children's programs and public service announcements.

[146] *Victor Broadcasting, Inc., supra.* The Commission has observed that a station's listeners are in the best position to judge the station's performance.

[147] *Broadcast Communications, Inc., supra.*

[148] Pillar's comparison of its operation with other stations was given no consideration in arriving at this conclusion. The other stations were located as far away as 50 miles and varied widely in terms of the population of the license community and their power and coverage. There was no showing that any of the stations serve a market with the same needs and interests as Zarephath.

mV/m contour (Joint Ex. 1, Fig. 11).[149] Numerous other AM and FM stations provide service to the area served by Stations WAWZ(FM) and WAWZ(AM).

15. Pillar of Fire, a New Jersey non-stock, non-profit corporation, is governed by a seven-member Board of Trustees.[150] A Colorado non-stock, non-profit corporation, also named Pillar of Fire, is the licensee of Station KPOF(AM), Denver, Colorado. An Ohio non-stock, non-profit corporation, also named Pillar of Fire, is the licensee of Station WAKW(FM), Cincinnati, Ohio.[151] Bishop Arlene Lawrence and Dr. E. Jerry Lawrence are trustees of the three Pillar of Fire entities, and Robert B. Dallenbach is a trustee of the applicant and the Colorado licensee. He is also the General Manager of Station KPOF, Denver, Colorado. Stated simply, applicant's principals comprise three of the seven trustees of the licensee of Station KPOF, Denver, Colorado, and two of the five trustees of the licensee of Station WAKW(FM), Cincinnati, Ohio. Bishop Arlene Lawrence is the president of all three corporations and Rev. E. Jerry Lawrence is the vice president of these three entities. More importantly, Bishop Lawrence, as General Superintendent of the Pillar of Fire Church and as president of the licensee corporations, is responsible for the overall supervision of all of the Pillar of Fire stations. These facts warrant attributing these other stations to Pillar for purposes of evaluating the applicants relative to media diversification.

16. RNJ is the licensee of standard broadcast Station WRNJ, a daytime-only station operating with 2.5 kW of power on 1000 kHz and is licensed to Hackettstown, New Jersey, which is located approximately 20-25 miles from Somerville, the proposed community.[152] Somerville is located just within the 0.5 mV/m contour of Station WRNJ(AM). RNJ's FM proposal would place a 1 mV/m or better signal over Hackettstown. Approximately 57% of the calculated 0.5 mV/m contour of Station WRNJ(AM) would receive a 1 mV/m signal from the RNJ FM proposal.[153]

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[149] Virtually all of the 0.5 mV/m contour of standard broadcast Station WAWZ(AM) is encompassed within the 1 mV/m contour of Station WAWZ(FM) (Joint Ex. 1, Fig. 11).

[150] The Commission has held that board members of a non-stock corporation are treated as owners for integration purposes. *Minneapolis Star and Tribune Co.*, 88 FCC 2d 1604 (Rev. Bd. 1982).

[151] Denver and Cincinnati are, respectively, approximately 1550 and 500 miles from Zarephath.

[152] RNJ's ownership of a radio paging and answering service is irrelevant to the diversification factor in a case involving broadcast applicants.

[153] Joint Exhibit 1 depicts the coverage relationship between Station WRNJ(AM) and Station WAWZ(FM). However, the Commission, in the *Designation Order*, found that the coverage of RNJ's proposal and Station WAWZ(FM) would be "essentially the same." Approximately 20% of RNJ's proposed 1 mV/m contour would receive a 0.5 mV/m signal from Station WRNJ(AM) (Joint Ex. 1, Fig. 2).

Numerous other AM and FM stations provide service to all of the service area of the RNJ FM proposal.

17. A slight-to-moderate preference will be awarded to RNJ relative to this aspect of comparative evaluation. The Commission has over the years considered common ownership of a broadcast station within the proposed community the most significant factor. However, here, Pillar's standard broadcast Station WAWZ operates only 31 hours a week. For this reason, the same weight is not given as would be if it were a daytime-only or a full-time operation. When weighing this factor and the additional broadcast interests of Pillar, which are located at a great distance, against the ownership by RNJ of a daytime-only station at Hackettstown, the equation warrants the assessment, at most, of a very moderate preference in favor of RNJ.

18. Addressing the question of integration of ownership with management, it is noted that one of the principals of RNJ, Norman Worth, a 33.3% owner, will devote full time to the operation of the station as its General Manager. Lawrence J. Tighe, Jr., also a 33.3% owner, will devote a minimum of 20 hours per week as the Chief Engineer of the station. He will supervise the planning and construction of the station's physical plant and will participate in the formulation and execution of start-up plans for the station. In addition to his engineering duties, Tighe will participate on a daily basis in the formulation and administration of station policies. It is ruled that RNJ is entitled to quantitative credit for 33⅓% full-time integration and 33⅓% part-time participation by its principals.[154] Since both Tighe and Worth are residents of Hackettstown, which is within the 1 mV/m contour, they will receive qualitative enhancement for local residence.[155] Their civic activities, limited as they are, do not warrant any qualitative enhancement credit, although both receive enhancement because of their broadcast experience.

19. Pillar can be credited with only 14.3% part-time integration. Only Dr. E. Jerry Lawrence has committed himself to devote a minimum of 20 hours a week of supervising the financial and legal aspects of the station's operation and in participating in station programming. Bishop Arlene Lawrence will devote 10 hours a week to the station's operation, and Rev. Robert B. Dallenbach will devote 5 hours a week to such operation. However, this limited participation cannot be characterized as part time and falls well below the 20 hours a week minimum for an award of partial integration. A "relatively slight part-time credit" is accorded to Pillar because of the limited participation by Bishop Lawrence and Rev.

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[154] The Commission has consistently granted integration credit for a principal proposing to be chief engineer. *Wolverine Radio Co., Inc.*, 49 FCC 2d 1043, 1050 (Rev. Bd. 1974).

[155] Since their residence is on the outer limits of the proposed service area, this enhancement should be characterized as moderate.

Dallenbach.[156] Dr. Lawrence is a resident of Belle Mead, New Jersey, which is located approximately five miles from Zarephath. He will receive enhancement for local residence. While he is credited with broadcast experience, his local civic activities are not sufficient to merit any qualitative enhancement.

20. It is concluded that, since full-time integration by RNJ is less than 50% of ownership, RNJ is entitled to a slight-to-moderate preference in this aspect of comparative evaluation. *Commanche Broadcasting, Inc.*, — FCC 2d —, FCC 84R-4, released January 19, 1984.

21. The findings detail the circumstances surrounding the issuance by RNJ of certain promotional materials for Station WRNJ(AM), Hackettstown, New Jersey. It is not necessary to repeat these findings here. It is sufficient to note full agreement with the holding by the Chief, Complaints and Compliance Division, Broadcast Bureau, that the population projection, the "cost per thousand efficiency analysis," and the "orientational" graphics, which depicted the station's contour, were misleading and inaccurate and tended to be deceptive. It is found that Tighe demonstrated an indifference as to whether the promotional material was accurate. He, certainly, should have known that certain representations in the promotional material overstated the station's potential audience and that other representations were not accurate.[157] The Presiding Judge recognizes that there is no evidence that any advertiser specifically relied upon this promotional material in purchasing time on Station WRNJ(AM). Nevertheless, it is ruled that these promotional activities of RNJ fall short of the standard of full disclosure and candor established by this Commission, reflect adversely on its operation of Station WRNJ(AM) and warrant the assessment of a comparative demerit.[158]

22. As discussed, *supra*, the Commission has recently emphasized that primary significance is to be accorded a broadcaster's past performance since that factor affords the strongest and most reasonable basis for determining whether the public will be served by license renewal. It has been determined that Pillar is entitled to a strong preference for its

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[156] *Greater Wichita Television, Inc.*, 90 FCC 2d 1046 (Rev. Bd. 1982); *WIOO, Inc.*, 95 FCC 2d 974, FCC 83-367, released September 16, 1983.

[157] Tighe was aware that Station WRNJ, operating with 1 kW power, directionally, did not place a 0.5 mV/m or better signal 20 miles in all directions. The "cost-per-thousand efficiency analysis" was misleading and inaccurate as to the actual size of Station WRNJ's listening audience and the cost-per-thousand of its advertising time. Additionally, the original sales kit contained an inaccurate graphics representation of Station WRNJ's coverage area.

[158] While the Commission has terminated its oversight of complaints alleging use of inaccurate coverage maps, it made clear that it would continue to consider the effect of adverse findings on a licensee's qualifications. *Broadcast Regulation*, 94 FCC 2d 619 (1983).

past broadcast operation during the license period. The Commission has made clear that a preference for past broadcast performance is entitled to more weight than "structural factors" such as integration and diversification.[159] The courts have upheld the Commission, ruling that it is appropriate to prefer a renewal applicant with a meritorious record over a challenger with preferences relative to integration and diversification.[160] RNJ was afforded slight-to-moderate preferences relative to both diversification and integration and is also entitled to a very slight preference because of its proposal to have auxiliary power. These preferences are offset, to some extent, by the demerit which must be assessed against RNJ because of its promotional activities relative to Station WRNJ(AM). It is ruled that RNJ's advantages under diversification and integration, offset by its demerit, are insufficient to overcome the strong preference awarded to Pillar for its past broadcast record.

Accordingly, IT IS ORDERED that, unless an appeal from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion, in accordance with Section 1.276(d) of the Rules, 47 C.F.R. 1.276(d),[161] the application of Pillar of Fire for renewal of license of Station WAWZ(FM), Zarephath, New Jersey, IS GRANTED and the application of Radio New Jersey IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
THOMAS B. FITZPATRICK, *Acting Chief Administrative Law Judge*

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[159] *Radio Station WABZ, Inc.*, cited *supra.*

[160] *Victor Broadcasting, Inc.*, cited *supra.*

[161] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release, pursuant to 47 C.F.R. 1.276(d).

Mutual Exclusivity
Satellite, Direct Broadcast
Signal Strength

DBS applications are not mutually exclusive where there are sufficient channels for all applicants, even though an applicant may not receive requested channels. DBS systems will be approved proposing power lower than that assumed for international planning purposes where it is demonstrated that the signal will be adequate reception by small, relatively inexpensive receive units. Systems proposing even lower power and failing to make a convincing demonstration will not be approved.
—Satellite Syndicated Systems, Inc.

Application, Unacceptable
Satellite, Direct Broadcast

DBS application is found unacceptable for filing where it fails to provide sufficient technical information to determine the exact nature of signals intended to be broadcast and no information is provided regarding sources or likely availability of funds to meet costs.
—Satellite Syndicated Systems, Inc.

Satellite, Direct Broadcast

Colocation of DBS satellites is permitted despite nonconformance with international plan, where it is shown that interference will not exceed tolerances provided in the international plan. Due to spectrum utilization concerns, such authorization will not have renewal expectancy, but will be reconsidered at time of renewal based on circumstances at that time.
—Satellite Syndicated Systems, Inc.

FCC 84-608

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
Satellite Syndicated Systems, Inc.	File No. DBS 83-01
Satellite Development Trust	File No. DBSD 83-02

National Christian Network	File No. DBS83-03
Advanced Communications Corporation	File No. DBS 84-01
Hughes Communications Galaxy, Inc.	File No. DBS 84-02
National Exchange, Inc.	File No. DBS 84-03
Space Communications Services	File No. DBS 84-04
For Authority to Establish Interim Direct Broadcast Satellite Systems	

MEMORANDUM OPINION AND ORDER

Adopted: December 4, 1984; Released: December 6, 1984

BY THE COMMISSION:

1. On october 14, 1983, the Commission issued a Public Notice accepting for filing the applications for interim Direct Broadcast Satellite (DBS) systems of the first three captioned parties and establishing a cut-off date of January 12, 1984, for any additional applications to be considered with them. The last four captioned applications were filed by that deadline, completing a "second round" of DBS applications. Consideration of these applications has been awaiting completion of the processing of a prior group of applications. The last of those prior applications was disposed of by the Commission in *CBS, Inc.*, FCC 84-477, released October 10, 1984.[1] The Commission herein considers these second-round applications, as well as petitions to deny two of them and related pleadings.

2. It appears that there are sufficient channels available to meet the requests of all of the qualified applicants, and, therefore, as they are not mutually exclusive, each can be granted a conditional construction permit.[2] These construction permits will authorize the permittees to

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[1] Graphic Scanning Corporation has filed a petition for partial reconsideration of *CBS, Inc.*, seeking reinstatement of its construction permit and the assignment of channels and orbital positions. While that petition is pending, it does not affect and is not prejudiced by any action taken herein.

[2] "The Commission has repeatedly stated that for DBS service 'All frequencies and orbital positions . . . shall generally be considered to be of equal value, and conflicting requests for frequencies and orbital positions will not generally give rise to comparative hearing rights as long as unassigned frequencies and orbital slots remain.' *DBS Report and*

proceed with the construction of their systems and will be conditioned on each permittee's due diligence in beginning construction, or completing contracting for construction of its satellite(s) within one year, and beginning operation within six years, of the date of release of this Memorandum Opinion and Order (47 C.F.R. §100.19). Specific orbital positions and channels will be assigned to each permittee upon its demonstration of due diligence on a first-come, first-served basis, as has been the procedure for past applicants. *Processing Procedures Regarding the Direct Broadcast Satellite Service* ("*DBS Processing Procedures*"), 95 FCC 2d 250 (1983).

3. Several additional DBS applications are also on file,[3] and a cut-off date will soon be established for submission of competing applications. The resulting group of applications will be considered as soon as possible, but not earlier than six months from the release of this Order. Any consequent additional permittees will also be assigned orbital positions and channels upon their due diligence demonstration on a first-come, first-served basis along with the permittees remaining from among those approved in this Order. Any grant of such additional conditional construction permits and assignment of facilities will not affect the substantive rights of these permittees, as such additional permits will only be granted if sufficient facilities are available to fulfill all outstanding channel demands.[4]

4. This varies from our procedure with the first group of DBS permittees, whereby later applications were not granted until the entire period for their demonstration of due diligence had run. Such a procedure is no longer necessary or desirable. Our primary concern in this regard is the provision of DBS service to the public. It is important that the spectrum be made available for use as efficiently and expeditiously as possible, and that no prospective DBS provider be delayed unnecessarily.[5] Those parties which obtain permits must be encouraged to proceed as promptly as possible, and any applicants awaiting consideration must be

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Order, [90 FCC 2d 676] 719; *accord, DBS Processing Procedures*, [95 FCC 2d 250] at para. 6. This provision is specifically included in Section 100.13(b) of the Commission's rules. 47 C.F.R. §100.13(b)," *Satellite Television Corporation*, FCC 84-208, released May 16, 1984, at ¶6.

[3] RCA American Communications, Inc. requests authorization for a new DBS system (File No. DBS 84-06); Dominion Video Satellite, Inc. and United States Satellite Broadcasting Company, Inc. request additional channels for their approved systems (File Nos. DBS 84-05 and DBS 84-07).

[4] In this connection, we strongly urge any permittee who decides not to proceed to so advise the Commission promptly, in order to make expeditious processing of additional application(s) possible.

[5] We recognize the continued increase in the variety of new alternative video entertainment sources, as well as the complexities and difficulties associated with financing major communications ventures.

given the opportunity to proceed as soon as it procedurally feasible and fair to all parties. The pioneer DBS applicants applied at a time when DBS technology was still in the very first stages of development. Technical requirements had not even been finalized at the time.[6] The first DBS applicants were developing the technology and the prototypical DBS systems and formulating the initial service plans at the same time applications were required to be filed, and thereby warranted a certain period of time to complete those efforts. The subject permittees, on the other hand, will have had already several years since the service was initiated and almost a year (and, in some cases, longer) since their applications were filed, during which to observe this development, anticipate their own needs, and plan the implementation of their systems. They should therefore be more fully prepared to proceed promptly than earlier applicants.

5. As a last general matter, we note that Title III obligations may apply to those DBS operators which will selectively lease their facilities on a non-common carrier basis. *Cf., NAB v. FCC*, 740 F.2d 1190 (D.C. Cir. 1984). Our approval of any of these applications does not reflect any judgment or determination regarding the regulatory assessment that will be ultimately applied to the licensee and/or its customers. This matter will be resolved before any license to operate is issued.

Satellite Syndicated Systems, Inc.

6. Satellite Syndicated Systems ("Syndicated") is a satellite resale common carrier, owns several television and translator stations, and is active in programming and delivery of cable and pay-TV service. Syndicated lists a majority stockholder and all other stockholders, officers and directors. Based on the information in its application, it is legally qualified.

7. Syndicated has proposed to launch two satellites, with each serving half of the continental United States ("half-CONUS") with six channels at 230 watts for an effective isotropic radiated power (EIRP) of 54.5 dBW. The preferred positions for the satellites are 101°W for eastern service and 148°W for western service (including Alaska and Hawaii); secondary choices are 110°W and 157°W respectively. Syndicated also proposes to build one on-ground spare if it is unable to reach an agreement with another operator using compatible (RCA) equipment to share an in-orbit spare. Syndicated's analysis projects that this system will permit use of a

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[6] On June 1, 1981, the Commission called for DBS applications to be filed within 45 days. The Commission's own "interim" rules were not adopted until July 14, 1982, and conditional permits were granted on October 13 and December 13, 1982. Technical parameters and international channel and orbital assignments were not agreed upon, however, until the Region 2 Administrative Radio Conference in August 1983 ("RARC-83").

receive antenna 0.6 meters in diameter in most locations, while a 1.0 meter antenna may be desirable in areas of heavy, frequent rains.

8. Syndicated's proposal to serve Alaska and Hawaii from 148°W is not provided for in the Region 2 Plan, and the Commission's own preliminary analysis indicates that international protection constraints may prohibit such service. Data from Syndicated and/or further Commission analysis contradicting this conclusion will be required before such an assignment can be made.

9. Syndicated intends to program four of the channels itself and to selectively lease the other two channels on a non-common carrier basis. Syndicated's cost projections are contained in its original (1982) application which called for a four-satellite system. It estimated costs totaling just under $550 million for construction, launch and associated expenses for its entire system, with additional operating and programming costs of $275 million per year. It expected to need $105 million in short-term financing for its first launch, followed by long-term financing of $175, $125 and $100 million in successive years, supported by $200 million in equity. That original application includes statements from Bache, Halsey and from Fahrnstock & Co., expressing their belief that financing should be available and their interest in participating in its arrangement. Syndicated's later amended proposal states that its revised, two-satellite system would cost approximately 30% less. On November 13, 1984, Syndicated further updated its cost estimate to reflect the changes in its system. It projects $223.5 million to build and launch its satellites, with first year operating and programming costs of $128 million. It expects to raise $203 million in short-term debt before launch, with $195 million in long-term debt supported by $45 million in equity, raised over a five-year period.

National Christian Network

10. National Christian Network ("Christian") provides audio and video facilities for the distribution of religious programming. Its reception is free and is currently intended primarily for reception and redistribution by cable television systems. Christian's principals are identified in its application and based on the information provided, it is legally qualified.

11. Christian has proposed to launch two satellites, with each serving half-CONUS with six channels at 230 watts for an EIRP of 54 dBW. The preferred positions for the satellites are 101°W and 148°W. Christian plans for one on-ground spare satellite. Christian's analysis projects the use of 1.0 meter and 1.5 meter receive antennas. Christian's original application states its intention to utilize videoplexing techniques to provide two signals on each bandwidth, as well as teletext or text-insertion-in-video service.

12. Christian's 1981 estimate of expenses totaled $319 million for three satellites, two launches, and associated earth support and facilities. Its 1981 application includes a statement by a securities broker/dealer that it is "confident" that a funding transaction in the neighborhood of $350 million can be made if a construction permit is granted, and states that dealer's desire to manage Christian's effort. It also includes several letters of interest and offers to lease or buy transponders from interested parties. Its amendment asserts that it "will have little problem in attracting funding support from financial institutions" after a construction permit is granted. It also states that additional funds will be available from the National Christian Network itself.

Advanced Communications Corporation

13. Advanced Communications Corporation ("Advanced") is an Arkansas corporation 100% owned by one individual, incorporated to provide DBS service. Advanced has listed the owner and the corporation's officers and directors. Based on the information in the application, it is legally qualified.

14. Advanced has proposed to launch two satellites, with each serving half-CONUS with six channels at 200 watts for an EIRP of 54 dBW. It prefers whatever orbital positions are being used by other DBS operators or permittees, with the additional requirement that they have a good elevation angle from Little Rock, Arkansas, where its earth station will be located. It intends to launch an in-orbit spare. Advanced intends to program three of the channels with a combination of subscription and pay-per-view services and to lease selectively three of the channels on a non-common carrier basis.

15. Advanced makes a detailed cost estimation, with a total cost for three satellites (including one spare) and two launches of $360 million, first-year ground segment costs of $60 million and $20 million thereafter, and programming costs for the three channels it will program. It anticipates revenue beginning in 1988 to contribute to growth. It has included statements from a financial adviser and an investment banker which indicate those parties' belief that financing will be available.[7]

Hughes Communications Galaxy, Inc.

16. Hughes Communications Galaxy, Inc. ("Hughes") is a subsidiary of Hughes Communications, Inc., which is wholly owned by Hughes Aircraft Company. The stock of Hughes Aircraft is 100% owned by

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[7] Advanced's application is supported by the Arkansas Science and Technology Authority, Arkansas Industrial Development Commission, and Arkansas Motion Picture Foundation, Inc. These parties' pleading finds Advanced a "highly qualified and desireable applicant" with many distinguished board members, proposing "high quality, alternative programs."

Howard Hughes Medical Institute, a non-profit charitable organization. Hughes Aircraft Company, has other subsidiaries active in the satellite and earth station building and operating business and in common carrier satellite activities. Based on the information in its application, it is legally qualified.

17. Hughes has proposed to launch two satellites, with each serving half-CONUS with sixteen channels at 100 watts for an EIRP of 51 dBW. The satellite will also be capable of full-CONUS service at 48 dBW and quarter-CONUS service at 54 dBW. The satellites will be colocated, with a preferred position of 119°W; secondary choices are 110°W, 101°W and 61.5°W. It has no stated plans for a back-up satellite. Hughes' analysis projects that this system will permit the use of 0.6 to 1.2 meter receive antennas.

18. Hughes states that it will selectively lease all channels on a non-common carrier basis. Hughes' detailed cost projections indicate $281 million in expenses before commencement of service, and $395.6 million total for 10 years of operation, with no programming costs. It will finance this venture with revenues generated internally by profitable enterprises of Hughes Aircraft and through use, where necessary, of a $300 million line of credit at Bank of America. Hughes includes letters from Hughes Aircraft and from Bank of America to verify these assertions. (Bank of America indicates that Hughes' line of credit can readily be raised to $500 million.)

19. United States Satellite Broadcasting Company, Inc. ("USSB"), a DBS permittee, has filed a petition to deny Hughes' application. USSB contends that Hughes' proposal for full-CONUS service from 119°W violates the Region 2 Plan in two respects. First, full-CONUs service from any single transponder is not provided for; second, western service from 119°W is not provided for. USSB contends that Hughes has made no demonstration in support of this variant proposal.

20. USSB also questions whether the public interest will be served by a system utilizing a power level as low as proposed by Hughes. It insists that the fundamental objective of DBS is service direct to individual homes, but that the power level proposed by Hughes for full-CONUS service is not sufficient for such service. USSB asserts that, even at half-CONUS service, Hughes would provide one quarter of the power considered necessary by RARC-83 planners, with a C/I margin 13 dB below the RARC objective of 28 dB. The larger receive dish necessary for reception would be more expensive to build, more expensive to install, and more difficult to get approved by local zoning authorities. It would also be more susceptible to rain outage and poor picture quality and interference. USSB contends that Hughes' reliance on alleged improvements in receiving equipment is not substantiated, and that such reliance ignores

the fact that improved equipment will be more expensive and disregards the predicament of those consumers who will have already purchased DBS equipment. It contends that the FSS band (fixed satellite service) is allocated for such low power systems, and that an approval of such a system in the DBS band would constitute poor spectrum management, as future high power needs are not yet fully known and Hughes' system could retard or limit the growth of DBS service. It points to the Court's affirmation of the Commission position that antenna size, power, orbital spacing and frequencies are all characteristics which distinguish the DBS from the FSS band, in *USSB v. FCC,* 740 F.2d 1177 (D.C. Cir. 1984). It continues that the Commission should establish a power flux density requirement appropriate for small, inexpensive simple receive installations. It asserts that RARC-83 anticipates such receive installations and that there is otherwise no need for the wide (otherwise inefficient) orbital spacing which is provided for broadcast satellite services. Setting such a standard would be consistent with the Commission's "traffic cop" function to ensure efficient utilization of the spectrum, it argues,[8] and not inconsistent with encouraging maximum technological development and innovation. It claims that this is precisely the sort of "later development" necessitating Commission action which was anticipated in the *DBS Order, supra* at 717.

21. USSB also argues that in approving a system such as Hughes', the United States' credibility in future international negotiations would be undercut, as it has heretofore pressed for international technical parameters such as to permit the use of the DBS allocations for individual home reception units. USSB points out that the Region 2 Plan has yet to be ratified by the 1985 World Administrative Radio Conference, which ratification could be jeopardized by any action calling into question the United States' past resource requirement and usage projections.[9]

22. Hughes responds that its system is intended to operate half-CONUS, not full-CONUS as apparently presumed by USSB, thereby blunting all of USSB's premises and consequent arguments regarding signal adequacy.[10] It would operate in a full-CONUS mode only in the

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[8] USSB cites §73.21 for AM, §73.211 for FM and §73.614 for TV service, of the Commission's rules. 47 C.F.R. §§73.21, 73.211, 73.614. These provisions were adopted pursuant to the Commission's express responsibility under the Communications Act to set power levels. 47 U.S.C. §§303(c), 324.

[9] USSB closes with the postulation that if Hughes' proposal is deemed acceptable, USSB must be given the opportunity to amend its proposal to obtain additional channels utilizing lower power levels, and to receive such allocation prior to any of the second group of applicants.

[10] USSB counters that if Hughes operates each signal half-CONUS with colocated satellites, each consumer who purchases an antenna and directs it to Hughes' orbital position will be able to receive only 16, rather than the full complement of 32 channels.

event that failure of some kind made it necessary to so function to protect a customer.[11] It argues that the RARC-83 guidelines include considerable latitude, and that its proposal may be at variance with but is not inconsistent with the Region 2 Plan. It notes that Dominion Video Satellite, Inc. ("Dominion Video") has already been approved to provide western service from 119°W, in contravention of the Region 2 Plan, and at a higher power (230 watts) than Hughes proposes (100 watts). Hughes states that it is willing to accept the same conditions regarding its ultimate performance as those imposed on Dominion Video. It also notes that Satellite Television Corporation ("STC"), one of the companies in the forefront of DBS technological development, has applied for a modification of its system (subsequently granted) to utilize full-CONUS channels, and will consequently provide a signal that is slightly weaker than Hughes proposes for its half-CONUS mode of operation.

23. Hughes further argues that the Commission has not previously attempted to specify power requirements or channel limitations and that no power minimums were established at RARC-83. It also argues that the final judgment of television picture quality is entirely subjective. It contends that such trade-offs should be left to the discretion of the entrepreneurs and that DBS is best served by a system which lowers the per-channel cost to the customer. It insists that it must have the freedom to develop the service, power and channelization plan which it judges to make both economical and technological good sense.

24. It insists that all DBS applicants were urged to take advantage of the Commission's flexibility in *DBS Processing Procedures, supra,* and that USSB has no more right to Hughes' number of channels than it has to its power level or service scheme. It concludes that USSB's choice not to respond to improvements in DBS technology cannot be allowed to shackle other DBS operators.

25. USSB's petition will be denied.[12] Direct Broadcast Satellite Service is defined domestically and internationally as a service "in which signals . . . are intended for direct reception by the general public. . . ."[13] In the *DBS Order*, *supra*, authorizing DBS service, the Commission described DBS as a service intended "for direct reception by small, inexpensive earth terminals." *Id.* at 677 n. 1. The pattern produced by a one-meter spherical dish, or its equivalent, was the reference for the allocation plan

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[11] USSB responds that Hughes' proposed full-CONUS service would be so deficient that no "protection" would be provided to Hughes' customers by this option.

[12] USSB will not be considered for additional channels on a "priority" basis. Should USSB desire additional channels to develop a system similar to Hughes', it should submit an application which would be considered at a time consistent with our procedural rules.

[13] 47 C.F.R. §100.3; International Radio Regulations Article I, def. 3.18.

adopted at RARC-83.[14] It was on the basis of the multitude of significant public benefits expected to flow from this type of service that the band was exclusively dedicated to DBS, despite conflicting demands and existing use by other services. *DBS Order, supra; aff'd in part, rev'd in part, sub nom. NAB v. FCC, supra.*

26. Beyond this basic tenet, flexibility in the design and development of DBS systems has been a hallmark of Commission oversight of this developing industry. *DBS Order, supra* at 716, 717; *DBS Processing Procedures, supra* at 254. The Commission has demonstrated this flexibility in permitting significant modifications generally,[15] and specific deviations from the Region 2 Plan such as full-CONUS service and colocation of satellites,[16] and the institution of DBS-type service from the FSS band,[17] where feasible and desirable. However, the Commission must also assure that scarce resources are used to provide an acceptable level of service. 47 U.S.C. §§303(c), 324.[18] In the DBS context, the Commission has explicitly warned that "nonconforming proposals that would decrease the efficiency of spectrum utilization ... may come under intense scrutiny." *Id.* at 255.

27. There is credible information and analysis provided by Hughes, and otherwise publicly available, to indicate that a signal with the strength proposed by Hughes' system, when operating on half-CONUS mode, can be received in a manner intended for DBS service.[19] This proposal provides essentially the same signal strength provided by the STC proposal recently approved in *CBS, Inc.*, FCC 84-477. In conjunction with its modified service proposal (for full-CONUS in place of half-CONUS signals), STC's research indicates that the expected drop in signal strength can be made up in improved transmission format and updated

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[14] The Final Acts of RARC-83, Part I, Annex 5, Section 3.7.1 specifies that the diameter of the receiving antenna used for planning is such that the half-power beamwidth is 1.7°. Under currently valid technical assumptions, this corresponds to a one-meter diameter antenna at mid-band (12.5 GHz).

[15] *DBS Processing Procedures, supra* at 254; *CBS, Inc. and Dominion Video Satellite, Inc.*, FCC 84-275, released June 18, 1984; *Satellite Television Corporation*, FCC 84-208, released May 16, 1984; *CBS, Inc.*, FCC 84-477, released October 10, 1984.

[16] *Id.*

[17] *GTE Satellite Corp.*, 90 FCC 2d 1009 (1982); 94 FCC 2d 1184 (1983); *aff'd in part, rev'd in part, sub nom. USSB v. FCC*, 740 F.2d 1177 (D.C. Cir. 1984).

[18] Pursuant to this responsibility, the Commission has mandated signal requirements in all of the broadcast services. See 47 C.F.R. §§73.21, 73.211, 73.614.

[19] The utility of full-CONUS signals at the proposed power level for "emergency" service is questionable if the signal is not suitable for primary service. However, this is a judgment to be made by Hughes and its clients. This temporary or occasional use does not present the same questions of efficient spectrum utilization or appropriate DBS service as do the other proposals considered herein which propose this lesser signal strength on a full-time basis. See paras. 30-44, *infra.*

receiver performance specifications (*e.g.*, G/T and threshold extension) for prototypical reception components.[20] STC's fully developed marketing plan calls for its largest receiving dish, for a minority of subscribers at the fringe of service, to be 0.9 meters; others will be served with 0.6 and 0.75 meter dishes. Even if Hughes' and STC's expectations are not fully achieved, they will be able to provide a service with relatively small dishes as intended for DBS.

28. Given the signal strength Hughes proposes, and the dish size it will utilize, FSS service is not an alternative possibility for Hughes. FSS cannot accommodate the power level proposed and its orbital spacing would not permit the use of the small receive antennas planned.

29. Hughes' proposed western service from 119°W is not now at issue, as several of the channels at that position have been assigned to Dominion Video, and Hughes' request for all thirty-two thus cannot be accommodated. Should Hughes request, upon its showing of due diligence, another single orbital position for both of its satellites, such a proposal can be approved upon appropriate analysis. However, Hughes is hereby explicitly advised, as are all other DBS permittees in similar circumstances, that a system with colocated satellites might not be renewed in the same configuration. Colocation of half-CONUS transponders does reduce the number of channels available to any given viewer from one position and may reduce the ultimate utilization of DBS orbit/spectrum resource.[21] Accordingly, the Commission will reevaluate the demand for DBS orbit/spectrum resource, the availability of alternative channels, and the relative advantages of colocation compared to a return of those same channels to eastern service at any time Hughes' or another similar operator's renewal application is tendered.

National Exchange, Inc.

30. National Exchange, Inc. ("NEX") is a Delaware corporation, based in California. Its stock is wholly owned by one individual, and its officers and directors are listed in another application incorporated by reference. Based on the information provided, NEX is legally qualified.

31. NEX has proposed to launch two satellites, with each providing two separate half-CONUS signals of eight channels each at 50 watts for an EIRP at center of service area of 50.6 dBW. The satellites would be colocated, with the preferred position 101°W (where NEX has applied for

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[20] STC has done an analysis precisely calculating each dB of performance improvement which will cumulatively compensate for each dB of signal degradation resulting from wider coverage/lower power.

[21] If colocation of satellites at eastern-designated positions becomes more prevalent, "eastern" positions may all be tapped before the "western" positions are. This would leave numerous frequencies available for a limited western service area without the corresponding "eastern" frequencies necessary to facilitate wide-area service.

satellites in the C- and Ku-bands).[22] NEX proposes to have both even and odd (oppositely polarized) channels on each satellite, as well as to use linear polarization (common to communications satellites), rather than the circular polarization adopted as the international DBS standard at RARC-83 and universally proposed by the other DBS permittees and applicants. NEX proposes to build one on-ground (hyphen) ground spare. NEX's service projections are based on the use of a 2.0 meter receive antenna.

32. NEX states that it will selectively lease all of its channels on a non-common carrier basis. It intends to offer its clients capacity for analog video entertainment and information for the public, analog video non-entertainment for business and residences, and digital information to homes and offices. NEX projects costs which total approximately $300 million total to begin operations, with expenses of approximately $100 million per year thereafter. It provides no balance sheet as it does not intend to rely on its own resources to finance the venture. It asserts that it has made "substantial progress" with financiers in completing its financial arrangements.

33. USSB has also filed a petition to deny NEX's application. It has many of the same points of contention as with Hughes' application: western service from an "eastern" position (101°W), no discussion of resulting interference problems (USSB identifies specific Canadian and Mexican orbital positions), the public interest impact of low power systems, the United States' credibility, and the reception of only 16 channels from that orbital position by a viewer; USSB again asserts its own right to receive prior consideration for additional channels if low power levels are accepted. USSB allows that a rulemaking procedure is preferable to an *ad hoc* determination regarding power minimums, but insists that NEX's proposal is deficient under any reasonable standard. It points out that NEX's proposed signal power is one eighth of the RARC-83 planned power, and that it further "rolls off" over 4 dB more before reaching the edge of CONUS. It also argues that NEX has failed to consider or demonstrate the effects of received interference on its weak signal. It points out that the Commission has stated that mere non-interference is not a sufficient basis for deviation from the Region 2 Plan in *DBS Processing Procedures, supra* at 255. Regarding NEX's plan for "full service integration," USSB maintains that DBS is intended for individual homes, not NEX's anticipated FSS customers, and that this proposal effectively constitutes an admission by NEX of its intended use as an alternate route for FSS traffic. That NEX bases its service calculations on two-meter receive dishes is seen by USSB as further evidence of NEX's plans to offer an FSS, rather than DBS service.

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[22] File Nos. 1824-27-DDS-P/LA-83, 1828-DSS-P-83.

34. USSB argues that a linear polarized receive antenna will suffer a 3 dB loss in the reception of circular-polarized DBS signals. Additionally, their inability to distinguish right hand from left hand circular polarization will further prevent them from effective reception of any other DBS signals from an orbital position broadcasting adjacent (cross-polarized) channels, thus making "captives" of NEX subscribers - an unnecessary and unjustified deviation from the Region 2 Plan. Furthermore, in addition to their size, NEX's receive antennas will be even more expensive to install due to their greater rotational alignment sensitivity.

35. NEX responds that the Commission has foreseen "significant deviation" from the Region 2 Plan, and has encouraged flexibility in conforming to the spirit of the Plan, especially regarding power, power flux density, and polarization, in *DBS Processing Procedures, supra* at 254. It claims that individual and precise interference analysis is unnecessary given its low power signal, with its closely shaped beam and fast roll-off. It further claims that it will make whatever changes are demonstrated to be necessary after study upon the availability of the computer analysis software. It argues that lower power usage actually increases spectrum utilization efficiency and that the United States' credibility will be enhanced by a demonstration of its commitment to use all technology possible to increase efficient utilization of the spectrum resource. It contends that operating at a lower power increases the number of channels of entertainment and non-entertainment services that can be offered, and that the marketplace should be left to determine the ultimate trade-off. It maintains that the Commission has already approved just such innovative uses of DBS frequencies and the provision of DBS service at relatively low power in *GTE Satellite Corp., supra* at 1011 n. 5; 94 FCC 2d 1184 (1983); *aff'd in part, rev'd in part, sub nom. USSB v. FCC, supra.*

36. NEX points out that in approving Dominion Video's proposal for colocated satellites, the Commission has already given its judgment on the question of how many channels need be received from one orbital position. It claims that the public will benefit from the economies of scale achievable from having several satellites colocated, including some in different frequency bands. Its customers will thus get better service at a lower cost and will receive only linearly polarized signals anyway, as NEX will use all the available channels at its orbital position. NEX submits the affidavit of an engineer attesting to the usability of one-meter receive dishes for its signal.

37. USSB's petition to deny will be granted to the extent indicated below. We have serious reservations about NEX's proposed signal quality, ability to provide service to the edge of CONUS, and the nature of

its resultant service, and therefore cannot conclude that the public interest will be served by grant of its application at this time.

38. While we are not constrained by the power levels assumed at RARC-83, they do provide a significant frame of reference. The systems of STC and of Hughes which have been or are herein conditionally accepted, provide for only one quarter of the RARC-83 presumed signal strength. However, those proposals are vindicated by detailed analysis of the reception capacity required for these signals, and of where the drop in strength can be made up by specified known improved transmission formats/methods and existing and prototypical reception equipment. NEX's proposal, on the other hand, provides only one eighth of the RARC-83 presumed power, a further reduction by half from the Hughes and STC proposals. This requires even stronger analysis and justification. NEX provides only bald assertions and speculative statements. What is telling, is that NEX bases its service projections on the use of a two-meter receiving dish, which is clearly inconsistent with the intended nature of DBS service.[23] Approval of such a system, which does not utilize the power limits available and the wide orbit spacing provided domestically and internationally, and is not shown to be reasonably available to the public at large, would not represent an efficient use of the spectrum.[24]

39. As USSB suggests, the service proposed here by NEX can be provided as an FSS operation. Its proposed power is on a par with other applications in that band[25] and its receive antenna can tolerate the closer orbital spacing. It has no specific need to be in the DBS band for the service it intends to provide. It is not taking advantage of the high power allowance, and cannot be said to be taking advantage of or contributing to the services or viewers provided by other DBS operators, as its transmit

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[23] NEX has submitted an affidavit from an engineer claiming that (unspecified) "technological advances" will permit the use of dishes "in the one-meter range," with a choice of sizes depending on factors including "desired reception quality." This brief generalized statement is not sufficiently credible to warrant the approval of this system in view of the reservations expressed herein.

[24] The fact that any given operator or satellite can provide more channels by decreasing power per channel does not thereby increase the overall utilization of the spectrum. The efficiency of spectrum utilization is more properly judged by the cumulative service provided by all operators. *I.e.*, one two-channel, half-power operator does not effect greater utilization than two one-channel, full-power operators. It would be premature to presume at this point that not all DBS channels will be utilized.

[25] The following applications are illustrative of those currently on file requesting FSS facilities:

> Advanced Business Communications: 50 watts/channel, full- and half-CONUS (File Nos. 1361, 1362-DSS-P/LA-82, 1363-DSS-P-82); RCA American Communications, Inc.: 45 watts/channel, half-CONUS (File Nos. 1457, 1458, 1459-DSS-P/LA-82, 1460-DSS-P-82); United States Satellite Systems, Inc.: 40 watts/channel full- and half-CONUS (File Nos. 448, 449-DSS-P/LA-82, 450-DSS-P-82).

and receive equipment alone would be incompatible with all other systems.[26]

40. In *DBS Processing Procedures,* the Commission explicitly advised all permittees and applicants that, for any proposed system not in accordance with the Region 2 Plan, they "should give a full explanation" why their proposal is in the public interest, and that they should "recognize that nonconforming proposals . . . may come under intense scrutiny as a matter of domestic policy . . . ." *DBS Processing Procedures, supra* at 255. However, as the Commission has not had occasion previously to indicate those technical areas it deems critical to minimal acceptable performance, requiring justification, and what might constitute a "full explanation" to justify such deviations from the Region 2 Plan with regard to various technical matters, we believe it would be inappropriate to disqualify NEX on this basis and return its application. Rather, in accordance with the discussion on the deficiencies of NEX's technical proposal in the preceding paragraphs, NEX will be given forty-five days to amend its application to satisfy or conform with the concerns expressed herein. To the extent that this requires a significant modification of its proposal, new cost figures should also be submitted. A minor modification submitted in response to this requirement will not be treated as a new application. A proposal for increased power will not, alone, constitute a major amendment. If NEX fails to respond within the allotted forty-five days, the staff is authorized to dismiss NEX's application for failure to prosecute.

Satellite Development Trust

41. Satellite Development Trust ("SDT") is a limited partnership with one general partner - Satellite Development Corporation, a California corporation. The principals of the corporation are identified, and based on the information in its application, SDT is legally qualified.

42. SDT has proposed to launch two satellites, with each serving half-CONUS with sixteen channels at 50 watts for an EIRP of 47 to 52 dBW. The preferred positions for the satellites are 61.5°W for eastern service and 148°W for western service; 166°W and 175°W are considered unacceptable. These satellites will carry batteries for full eclipse protection. SDT would also launch an in-orbit spare. SDT has requested the assignment of odd and even (*i.e.,* opposite polarized) channels on each satellite, although it will accept an assignment of all odd or all even channels. It also states that if there is not sufficient spectrum to meet

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[26] The Commission's approval of a DBS-type service in the FSS band for United Satellite Communication, Inc. (*GTE Satellite Corp., supra*) demonstrates the Commission's flexibility, but does not imply its ratification of a low power level for DBS service. The power level approved was consistent with that provided in the FSS band at the time, where the service was being provided.

these requirements, it will accept and build a system with six channels on each of the two satellites, with each serving half-CONUS at 110 watts. SDT projects the use of receive antennas 0.75 to 1.2 meters in diameter.

43. SDT intends to program some channels itself and selectively lease others on a non-common carrier basis. SDT projects space and ground segment, and launch and support costs which total $301 million for the ten year life of its satellites. It also projects programming costs for the channels it will program, beginning at $27 million for its first year and rising through $99 million in its fifth year to $127 million in its tenth year. It expects to finance its venture by a public offering of equity and/or short-term financing after the grant of a construction permit. It anticipates operating at a profit by 1989 or 1990, with 4.4 million subscribers by 1991.

44. SDT has not documented the viability of its proposed signals for the provision of DBS service. In fact, it apparently has reservations about its own proposal. It states that if fewer channels than requested are available for its use, it will provide a higher power service, apparently unsure of the technical and economic viability of a 50 watt half-CONUS signal. The concerns previously expressed with regard to NEX's proposed system apply equally to SDT's, as do the equitable considerations. Accordingly, SDT will be given forty-five days to amend its application to satisfy or conform to the concerns expressed herein. To the extent that this requires a significant modification of its proposal,[27] new cost figures should also be submitted. Any minor modification submitted in response to this requirement will not be treated as a new application. Absent compelling justification and technical analysis, the Commission is reluctant to deviate from the Region 2 convention of providing 0.4° spacing between oppositely polarized channels at the same nominal orbital position, due to possible inter- and intra-orbital position interferences consequences resulting from the consequent reduced spacing. If SDT fails to respond within the alloted forty-five days, the staff is authorized to dismiss SDT's application for failure to prosecute.

Space Communications Services

45. Space Communications Services ("SpaceCom") is a joint venture owned 50% by a corporation and 50% by three individuals. The corporation is 100% owned by another corporation, RBC Communications Corporation, which is involved in MDS and subscription television operations. The principals of SpaceCom and of RBC are identified, and based on the information in its application, it is legally qualified.

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[27] SDT's "alternative" proposal was not explained with the specificity required for an application, and if SDT opts for that alternative, it must be fully explained.

46. SpaceCom has proposed to launch two satellites, with each serving half-CONUS with six channels and six additional spot beams (including service to Alaska, Hawaii, Puerto Rico and the Virgin Islands). SpaceCom provides no other information regarding its intended system, except to state its intended conformance with the RARC-83 parameters, and a power flux density goal.

47. SpaceCom intends to program some channels as advertiser-supported television and radio and to selectively lease the others to pay TV services on a non-common carrier basis. SpaceCom expects to build and launch its satellite and establish its earth stations for $202 million, with additional first year operating costs of $20 million. It indicates no specific existing or anticipated sources of funds to meet those expenses or basis for an expectation of raising those funds.

48. SpaceCom's application contains insufficient information to be considered minimally acceptable for filing, and therefore will be returned.[28] It provides minimal information about the technical characteristics of the proposed system, beyond the number of channels and orbital positions which it requests, the ultimate power flux density it seeks to achieve and its stated intention to observe RARC-83 parameters. It fails to specify fundamental EIRP coverage characteristics, or the power output and footprint design from which they can or will be derived, or the power density figures they will provide. There is no power budget analysis or any other information with which to permit assessment of the efficacy of its proposed service. The analysis and actions taken elsewhere in this Order demonstrate the significance of this information. Our rules specifically requires that a DBS application must include "a showing describing ... the technology that will be employed, and all other pertinent information . . . . " (47 C.F.R. §100.13). Furthermore, this specific information was explicitly required for International Frequency Review Board notification in *DBS Processing Procedures, supra* at 255. An application lacking the equivalent information for any other service would be rejected.

49. Beyond our concern that application requirements are met to provide the information necessary for analysis of the acceptability of an applicant's proposal, as well as its basic qualifications, the lack of information here generally casts doubt on the extent of SpaceCom's own

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[28] The prior "acceptance for filing" of this application on May 30, 1984 (Public Notice 4522, Report No. DBS-1B) was primarily a ministerial act. The Commission explicitly "reserve[d] the right to return any application if upon further examination it is determined that the application is defective" or not in conformance with regulatory provisions.

consideration of its DBS plans.[29] For instance, SpaceCom indicates that it does not even know the redundancy it will require or the extent of its intended eclipse protection (battery) capacity. Furthermore, the limited information regarding costs submitted by SpaceCom is not supported, and there is no clear plan or basis for an expectation of financing.[30]

50. We recognize that "flexibility" has been the hallmark of this service, and the variety of services proposed and approved herein testifies to the flexibility we allow for permittees. Each other proposal, as varied as they are, includes a specific proposal for an identified defined service and an indication of how that performance would be achieved. Each applicant also demonstrated a clear evaluation of the costs involved and recognition of the steps necessary to meet those costs.

51. All parties interested in applying for DBS systems have had ample notice that technical information would be carefully considered in examining DBS proposals (*id.*; *DBS Processing Procedures, supra*), and that the Commission believes "it is reasonable to construe as within the scope of 'all other pertinent information' at least sufficient information to evaluate an applicant'[s] basic legal and financial qualifications." *Advance, Inc., supra* at 189. An applicant for a radio license who either ignores or fails to understand the Commission's clear and valid application requirements assumes a risk that its application will not be accepted and the Commission need not accept an application that fails in major and material respects to provide information it has determined necessary to a consideration of its merit in the public interest. *Ranger v. FCC*, 294 F.2d 240, 242 (D.C. Cir. 1961). The Commission's strict adherence to these principles has already been demonstrated and justified in its return of several earlier DBS applications in *Advance, Inc., supra.* Accordingly, SpaceCom's application will be returned as unacceptable for filing.

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[29] This is a contributing factor due to the long lead times that are required for construction, the importance of prompt initiation of service, and the capacity of a permittee who ultimately fails to proceed to nonetheless prevent spectrum from utilization for at least a year before another party can even be considered for authorization to begin construction.

[30] SpaceCom contends that the due diligence requirement (47 C.F.R. §100.19(b)) is intended to let the marketplace, rather than the Commission determine financial qualifications. Moreover, it asserts, Section 100.13 of the rules does not specify a demonstration of financial qualifications as an application requirement. The Commission has stated that the "true test of each applicant's ability to construct will be its performance on the due diligence requirement." *CBS, Inc.*, 92 FCC 2d 64, 108 (1982). In that same Order, however, the Commission did make a basic qualifying analysis of each applicant's financial proposal, and specifically required an amendment from one applicant who had failed to specify its costs. *Id.* Section 100.13 of the rules has been interpreted to include information pertaining to financial qualifications. *Advance, Inc.*, 89 FCC 2d 177, 189 (1982); *aff'g Advance, Inc.*, 88 FCC 2d 100 (1981).

52. As a final matter, most of the applicants have submitted only vague proposals for their tracking, telemetry and command ("TT&C") functions, or none at all, and none for earth station uplink facilities.[31] As the time required for construction of these facilities is shorter than for satellites, it is not necessary for any permittee to begin their construction at the same time. Nonetheless, we assume that these proposals and applications will be submitted promptly. We advise these permittees that, in order to facilitate planning by the Commission and other current and potential DBS permittees, they may be required to submit their proposals for TT&C functions at some specific date in the future upon 30 days' notice. As the channels to be utilized for their programming uplinks will correspond to their broadcast (downlink) channel assignments, their earth station applications can be tendered whenever prudent business judgment dictates.

53. Accordingly, IT IS ORDERED, That the application of Satellite Syndicated Systems, Inc. for an interim direct broadcast satellite system to provide service from two satellites, each to deliver six channels to half of the continental United States, as described in this Order and its application, File No. DBS 83-01, IS GRANTED, subject to the following conditions:

(a) This grant does not include launch and/or operational authority for any phase of the proposal;

(b) This grant does not include assignment of frequencies or orbital positions for any satellite; and

(c) The applicant must proceed with the construction of its system with due diligence as defined in Section 100.19 of the Commission's rules (47 C.F.R. §100.19).

54. IT IS FURTHER ORDERED, That the application of National Christian Network for an interim direct broadcast satellite system to provide service from two satellites, each to deliver six channels to half of the continental United States, as described in this Order and in its application, File No. DBS 83-03, IS GRANTED, subject to the conditions (a), (b), and (c) in paragraph 53 above.

55. IT IS FURTHER ORDERED, That the application of Advanced Communications Corporation for an interim direct broadcast satellite system to provide service from two satellites, each to deliver six channels to half of the continental United States, as described in this Order and in its application, File No. DBS 84-01, IS GRANTED, subject to the conditions (a), (b), and (c) in paragraph 53 above.

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[31] Hughes has submitted a complete request for TT&C facilities. However, as the downlink facilities it has requested in its application are no longer available, it may desire a minor modification of its TT&C request in conjunction with a new channel/orbit request. We will act after being so advised by Hughes.

56. IT IS FURTHER ORDERED, That the petition to deny the application of Hughes Communications Galaxy, Inc., filed by United States Satellite Broadcasting Company, Inc., IS DENIED.

57. IT IS FURTHER ORDERED, That the application of Hughes Communications Galaxy, Inc. for an interim direct broadcast satellite system to provide service from two satellites, each to deliver sixteen channels to half of the continental United States, as described in this Order and in its application, File No. DBS 84-02, IS GRANTED, subject to the conditions (a), (b), and (c) in paragraph 53 above.

58. IT IS FURTHER ORDERED, That the petition to deny the application of National Exchange, Inc., filed by United States Satellite Broadcasting Company, Inc., IS GRANTED to the extent indicated herein.

59. IT IS FURTHER ORDERED, That National Exchange, Inc. IS PERMITTED to amend its application (File No. DBS 84-03) within forty-five days to conform to the concerns expressed in this Order.

60. IT IS FURTHER ORDERED, That Satellite Development Trust IS PERMITTED to amend its application (File No. DBS 83-02) within forty-five days to conform to the concerns expressed in this Order.

61. IT IS FURTHER ORDERED, That the application of Space Communications Services for an interim direct broadcast satellite system to provide service from two satellites, each to deliver six channels to half of the continental United States, with additional spot beam service and service to Puerto Rico, Virgin Islands, Alaska and Hawaii, as described in this Order and in its application, File No. 84-04, IS RETURNED as incomplete and unacceptable.

62. IT IS FURTHER ORDERED, That the Chief, Mass Media Bureau shall send by *Certified Mail - Return Receipt Requested*, a copy of this *Memorandum Opinion and Order* to each of the applicants and petitioners.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Fairness Doctrine, Licensee Obligation

If a complainant establishes that the issue involved is both controversial and of public importance, the broadcast presented a viewpoint on one side of this controversial issue of public importance and the licensee's overall coverage of the issue was imbalanced, it has established that the licensee is in violation of the Fairness Doctrine. —*Syracuse Peace Council*

FCC 84-518

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Complaint of Syracuse Peace Council against Television Station WTVH Syracuse, New York	

MEMORANDUM OPINION AND ORDER

Adopted: October 26, 1984; Released: December 20, 1984

BY THE COMMISSION: COMMISSIONER QUELLO CONCURRING IN RESULT; COMMISSIONER DAWSON DISSENTING AND ISSUING A STATEMENT

1. The Commission has before it a complaint filed December 15, 1983, by the Syracuse Peace Council (hereinafter SPC or complainant) against Syracuse, New York, television station WTVH (hereinafter licensee), licensed to the Meredith Corporation, Des Moines, Iowa. The complaint is based on WTVH's broadcast of "a series of spot editorial advertisements for the Energy Association of New York, broadcast from July 7 to September 7, 1982." (See Attachments I-III). Complainant alleges that in these spots the licensee "advocated construction of the Nine Mile Point II nuclear plant as a sound investment in New York's energy future" without presenting the contrasting viewpoint, thereby violating the Fairness Doctrine.

2. SPC defines the controversial issue of public importance which was discussed during the advertisements as "whether the Nine Mile II plant is a sound investment for New York." Further, SPC asserts that the advertisements present the viewpoint that Nine Mile II is a wise investment that will improve New York's economy. With regard to the issue's controversiality SPC states, "Evidence of the controversy surrounding this issue appears in citizen action, statements of community officials, and newspaper and television coverage." Complainant provides numerous newspaper clippings and evidence of the extensive media coverage given to the issue. SPC also makes reference to citizen complaints filed with local community groups regarding the halting of the Nine Mile II project. Finally, to demonstrate official disagreement with the advertisements' perspective on the issue, complainant provides public statements by New York Public Service Commissioner Rosemary Pooler. To substantiate its allegations as to the issue's public importance SPC states that "[t]he continually escalating cost of the plant will raise utility rates dramatically . . . [and] if the final costs of Nine Mile II exceeds $4.6 billion, the utilities will pass extra expenses to stockholders as well." Therefore, complainant concludes, the determination of the subject issue will have a significant impact on a large sector of the community.

3. Complainant argues that the advertisements "obviously and meaningfully" present one side of the issue, which is that the nuclear power plant project is a wise investment for New York. To substantiate this allegation they rely most heavily on the advertisements' "tag line, 'Nine Mile II . . . a sound investment for New York's future.' " Furthermore, complainant argues that the advertisements support the pro-nuclear plant viewpoint by relating other social and economic problems to energy needs and subsequently depicting Nine Mile II as a sound solution to these problems. Complainant cites unemployment and U.S. dependency on foreign oil as the problems used by the Energy Association of New York to justify New York's investment in the plant. SPC maintains that WTVH's initial position with regard to the issue discussed during the advertisements was that it involved the elimination of U.S. dependence on foreign oil. SPC argues that WTVH's position is untenable in view of the tag line. Complainant states that "[a]ll of the ads obviously and meaningfully propose reasons to support [its] thesis that Nine Mile II is a sound investment for New York's future." Therefore, SPC concludes, these "ads powerfully present only one viewpoint."

4. Complainant alleges that "[t]he licensee has not afforded and apparently does not plan to afford an opportunity for presentation of contrasting viewpoints." SPC asserts that in a series of letters to the station it informed the licensee of the fact that it was in violation of the Fairness Doctrine, and requested that the licensee "correct the program-

ming imbalance by broadcasting contrasting points of view." Complainant bases its allegation "on public monitoring of WTVH and on the licensee's responses to complainant's letters." Complainant further explains that members of the SPC "regularly watch substantially all of WTVH's local and network news, entertainment, and public affairs programming." SPC states that beginning several months prior to July 7, 1982, up to the time of the complaint, its members "have observed programming during each day part of the broadcast day; those with daytime jobs routinely watch at night, while others consistently view daytime selections."

5. On January 11, 1984, we asked WTVH to comment on the complaint. On February 6, 1984, WTVH filed its response. WTVH takes issue with complainant as to the applicability of the Fairness Doctrine to the advertisements. WTVH also maintains that regardless of the fact that it incurred no fairness obligations it "has adequately addressed the topic . . .." WTVH disagrees with complainant regarding the issues discussed in the advertisements. The licensee defines the issues as "the need to eliminate dependence on foreign oil" and "the need for electricity." Furthermore, WTVH argues that "[t]he advertisements are institutional in nature and merely seek to portray a favorable image of the new Nine Mile Point nuclear energy plant." The licensee concludes that the advertisements do not "take an *obvious* or *meaningful* position on any controversial issue of public importance that is subject to vigorous debate among substantial elements of the Syracuse community." Regarding the advertisements' "tag line, 'sound investment for New York's future,' " WTVH asserts that SPC took it "out of context . . . to draw the unnecessary inference that the sponsor is somehow advocating a point of view on present costs of construction."

6. Although, the licensee disagrees with complainant as to what issue was discussed in the advertisements, it argues that even assuming that SPC's definition of the issue was correct, the issue is not controversial and of public importance. To substantiate this allegation WTVH states that the impact on the community cited by complainant involves rate increases. However, the licensee notes that at the time of the broadcast there were no requests for rate increases pending. The licensee further maintains that a rate increase was approved in April of 1982, whereas the spots were broadcast in July through September of 1982. In its reply WTVH asserts, "[t]he most recent request for a rate increase occurred in April of 1983, eight months after the broadcasts in question." The licensee concedes that "utility costs inevitably rise"; however, WTVH argues that "such a fact does not elevate the text of the specific advertisements in question to addressing an issue of public importance or to advocating a position on a rate hearing, particularly when none are pending at the time of the broadcasts." With respect to the issue's controversiality WTVH cites

Healy v. FCC, 460 F.2d 917, 922 (D.C. Cir. 1972), for the proposition that "[m]erely because a story is newsworthy does not make the story a controversial issue of public importance." WTVH asserts that the only media coverage cited by complainant which occurred contemporaneously with the advertisements consisted of a newspaper article discussing the advertising campaign and SPC's request for response time. WTVH concludes, citing *Environmental Defense Fund,* 90 FCC 2d 648 (1982) (hereinafter *EDF*), that such media coverage does not qualify as proof of the issue's controversiality. WTVH also denies that the issue has received any attention from local community leaders or local public officials.

7. WTVH asserts that the complainant "ineffectively" states the basis for its claim that the licensee has presented only one side of the issue in its overall programming. The licensee does not believe that complainant's "mechanical recitation that its members are regular viewers of WTVH's news, public affairs, and nonentertainment programming," is sufficient to meet its burden of providing the basis for its fairness complaint.

8. Next, WTVH argues alternatively, even assuming that the issue allegedly presented in the commercials is controversial and of public importance at the time of the broadcast, "WTVH did, in fact, present significant contrasting viewpoints on the matter of nuclear power and its attendant costs." To substantiate this allegation WTVH provides documentation establishing that:

(a) since April 1981 it has devoted two hours and forty-six minutes of special programming and public service announcements to the anti-nuclear point of view;

(b) since January 1982 it has presented an additional two hours, six minutes, and fifteen seconds of news stories dealing with the anti-nuclear point of view; and

(c) since January 1981 its news coverage of the pronuclear viewpoint has consisted of forty-six minutes and thirty-five seconds.

Therefore, WTVH concludes, even adding the total advertisement time, which it calculates as three hours, "does not make WTVH's overall programming imbalanced."

9. On February 22, 1984, complainant filed a "Reply" to the licensee's response. At the outset, complainant disagrees with WTVH's determination that the advertisements "advocating the construction of the Nine Mile Point II nuclear power plant, therein calling the plant a 'sound investment for New York's future,' does not express a point of view on whether Nine Mile II is a sound investment which will improve New York's economy." Complainant accuses WTVH of "mischaracteriz[ing] the issue [defined] in the complaint as 'nuclear power.'" SPC reiterates the arguments presented in its original complaint. Complainant also disagrees with WTVH's allegations as to the "promotional or institutional" nature of the advertisements. Complainant asserts that the advertisements "play 'an obvious and meaningful role in public debate,' and the

Fairness Doctrine applies." (Cite omitted.) Finally, complainant denies that WTVH's determination as to the absence of any Fairness Doctrine violations was reasonable. SPC argues that "[t]he station cites programming of no possible relevance to the issues."[1] Finally, complainant accuses WTVH of furnishing the Commission with an "undifferentiated mass of material [which] demonstrates just how seriously WTVH takes its fairness obligations."

Discussion

10. The Fairness Doctrine provides that when a broadcaster presents a discussion on one side of a controversial issue of public importance, it must afford a reasonable opportunity for the presentation of contrasting viewpoints. This policy does not require that "equal time" be afforded for each side, as would be the case if a political candidate appeared on the air during his campaign. Rather, the broadcaster has an affirmative duty to encourage and implement the presentation of contrasting views in its overall programming which includes statements or actions reported on news programs.

11. Both sides of an issue need not be given in a single broadcast or series of broadcasts, and no particular person or group is entitled to appear on the station, since it is the right of the public to be informed which the Fairness Doctrine is designed to assure rather than the right of any individual to broadcast his or her views. It is the responsibility of the broadcaster to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on the issue. *Green v. FCC*, 447 F.2d 323 (D.C. Cir. 1971). The Commission will review complaints, based on a broadcaster's failure to present programming on controversial issues of public importance or its failure to provide opportunities for the presentation of contrasting views, to determine whether the broadcaster can be said to have acted reasonably and in good faith.

12. In this context, to establish a fairness violation SPC must show that: (1) WTVH's formulation of the issue discussed during the three advertisements and its subsequent rejection of SPC's definition of this issue were unreasonable; (2) the issue discussed during the advertisements was the subject of controversy in the community at the time of the

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[1] *See* Response Exhibit C. WTVH cites the following news stories which are unrelated to the Nine Mile II project as evidence of its balanced coverage of the issue:

(a) "Nuke weapon freeze of City of New York"

(b) "Search for leak of Ginna"

(c) "Dispute Route 81 radioactive shipment"

(d) "Reinform police re toxic export"

broadcasts; (3) the issue was of public importance; and (4) a lack of balance in WTVH's overall coverage of the issue has left the public uninformed as to contrasting viewpoints. Additionally, SPC must establish that its members regularly view WTVH.[2]

13. Initially, we believe that SPC's characterization of the viewing habits of its members (see paragraph 4 above) is sufficient to show that complainant is familiar with the overall programming of WTVH, and therefore, SPC has met its procedural burden. *See Allen C. Phelps.*[3] Turning to the merits of the complaint, the first matter we must decide is whether WTVH reasonably determined that the advertisements at issue did not present one side of a controversial issue of public importance. We cannot so find. In this regard, the first step we must take is to determine whether WTVH reasonably framed the issue discussed in the advertisements. As indicated above, SPC defined the issue as "whether the Nine Mile II plant is a sound investment for New York." The licensee, however, disagreed with SPC's definition of the issue, arguing that the issues discussed during the advertisements were "the need to eliminate dependence on foreign oil" and "the need for electricity," neither of which, according to WTVH, is subject to vigorous debate among substantial elements of the Syracuse community.

14. One of the most difficult tasks the Commission faces in administering the Fairness Doctrine is judging the reasonableness of a broadcaster's definition of the issue presented by a program. As part of its prima facie case, a complainant must define the specific issue which was discussed during the broadcast(s) in question. Once a prima facie case has been established, the licensee is afforded an opportunity to comment on the complaint. If the licensee's formulation of the issue differs from complainant's, the Commission will review the licensee's formulation solely to determine if the licensee has acted reasonably and in good faith.

15. Here, WTVH rejected SPC's descripition of the issue as the economic soundness of the Nine Mile II project and framed it in terms of U.S. dependence on foreign oil and need for electricity. To determine whether the licensee was reasonable in its determination as to what issue was actually discussed during the advertisement, we carefully examined the texts of the advertisements. It is noteworthy that U.S. dependence on foreign oil was mentioned only in the first two advertisements while only the last advertisement mentioned "needed electricity." On the other hand, all three advertisements ended with the tag line "Nine Mile Point . . . a *sound investment* for New York's future." (Emphasis added.)[4] All three advertisements are framed in terms of problems facing New York—

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[2] *Fairness Report*, 48 FCC 2d 1, 11 (1974).

[3] 21 FCC 2d 12 (1969).

[4] See Attachment I.

unemployment, dependence on foreign oil, and the need for electricity—and a solution to these problems—the Nine Mile II plant. In this regard, the plain thrust of each of the advertisements is whether continued construction of Nine Mile II is desirable; the need for electricity and the elimination of foreign oil dependency are the reasons given by the Energy Association as to why this question should be answered affirmatively. Under these circumstances, we cannot find that the licensee's definition of the issue was reasonable. We recognize that different parties may reach different conclusions concerning the issue addressed by a broadcast, and that, unless the facts are so clear that reasonable people could not differ to the issue in question, a licensee's characterization of a broadcast will govern.[5] However, we cannot find that reasonable people could differ on the conclusion that the issue discussed and the point to be made by each of these ads is that the Nine Mile II plant is an economically sound investment and, therefore, an answer to New York's economic and energy problems. In this instance, complainant's characterization of the issues simply falls beyond the bounds of a licensee's wide zone of discretion.

16. We now consider whether WTVH was reasonable in its determination that the issue of "whether the Nine Mile II plant is a sound investment for New York" is neither controversial nor of public importance. The question of whether an issue is controversial is determined by measuring the degree of attention paid to an issue by government officials, community leaders, and the media.[6] The key issue here is whether the issue is the subject of vigorous debate with substantial elements of the community in opposition to one another. In its effort to show that the issue in question was controversial, the complainant submitted newspaper articles which discuss the controversy surrounding the construction of the plant. The ongoing debate as to the economic soundness of the Nine Mile II project is a constant theme in these articles, as evidenced by their titles: "A Sound Investment?";[7] "Nine Mile 2: A Broken Promise";[8] "Nine Mile II Cost Rises Again; Critics Renew Protest";[9] "Nine Mile 2: A Decade Late, $4 Billion More";[10] "Nine Mile 2: Up Again";[11] and "Nine Mile Point 2 Project Plagued by Overruns."[12] The causes of the cost overruns and further delays are also prevalent themes throughout these articles. They contain both news analysis and statements by government officials and utility company representatives

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[5] *EDF*, 49 RR 2d 629 (1981), *review denied*, 90 FCC 2d 648 (1982).

[6] *Fairness Report*, 48 FCC 2d 1, 12 (1974).

[7] The Syracuse New Times, September 22, 1982.

[8] The Post Standard, May 17, 1982.

[9] Syracuse Herald-Journal, February 1, 1983.

[10] The Post-Standard, April 25, 1983.

[11] *Id.* February 3, 1983.

[12] The New York Times, February 2, 1983.

regarding the controversy surrounding this project. According to the utility company representatives, the delays and cost overruns must be attributed to inflation and design, and regulatory changes in the plant. Critics of the project, on the other hand, charge that "runaway construction costs and poor workmanship" were the real reasons for the present condition of the project.[13]

17. These articles also document the concerns of public officials such as Rosemary Pooler, a member of the State Public Service Commission, Karen Burstein, head of the Consumer Protection Board, and New York Attorney General Robert Abrams. Regarding the issue of whether the Nine Mile II project will be able to help stimulate New York's economy and to solve its unemployment problem, Commissioner Pooler is quoted as saying that "the increased costs will have a disasterous effect on local customers and businesses and make New York less competitive in attracting and retaining businesses and industry."[14] Attorney General Abrams is concerned with the "catastrophic" effect that the constantly increasing costs of this project may have on consumers.[15] Karen Burstein refers to Nine Mile II as "an out-of-control monster."[16] To further substantiate its allegation that the issue is controversial, complainant maintains that citizens' complaints filed with the Consumer Protection Board and local community groups, in addition to the 20,000 petitions filed by citizens with the Public Service Commission urging abandonment of the construction project, reflect strongly held opinions contrary to those presented in the ads.[17]

18. We recognize that an issue that was once controversial and of public importance may no longer be because of the passage of time. For example, the Commission upheld the judgement of a licensee that the discussion *in 1972* of the World War II relocation of Japanese-Americans from the Pacific Coast to inland areas no longer involved a controversial issue of public importance.[18] Unlike that case and significant to our determination here is the fact that the issue of the economic soundness of an ongoing project, which could be halted at any time, may be relevant for the entire life of the project. According to the newspaper articles the project was approximately half completed when the ads were broadcast. These articles and the strong positions taken by government officials and large segments of the community demonstrate that the economic sound-

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[13] *See* Footnote 7-10.

[14] Syracuse Herald-Journal, February 1, 1983.

[15] *Id.*

[16] The Post-Standard, May 17, 1982.

[17] See original complaint, Exhibit 2, "Correspondence" letter of September 21, 1982.

[18] *Kilsoo Haan (KGO),* 37 FCC 2d 947 (B/c Bur. 1972), *review denied,* 39 FCC 2d 461 (1973). This is not to say that issues which were no longer controversial could not become controversial again.

ness and the continued construction of this project, with its continually escalating costs, were controversial when the Energy Association's advertisements were broadcast. In light of the information before us, WTVH's conclusory statements regarding the lack of real controversy and ongoing public debate over the issue presented in the announcements are not substantiated by the facts and do not provide a reasonable basis for the conclusion that no controversial issue of public importance was presented.

19. WTVH's heavy reliance on *EDF*[19] for the proposition that the economic soundness of Nine Mile II is not a controversial issue is misplaced. In *EDF*, complainants questioned whether there was a need to increase nuclear energy generating capacity. They characterized the issue as follows: "whether a choice exists, so that northern California's energy requirements—in whole or in part—can be met through *cheaper* alternative energy sources rather than new large control power plants." However, they failed to show that the need for new power plants was a controversial issue at the time of the broadcast. Here, the issue defined by SPC is one of the economic desirability of this particular project. SPC has provided considerable evidence to substantiate its allegation that the economic desirability issue is subject to vigorous debate in the community. (See paragraphs 16 and 17 above.)

20. Similarly, we do not believe that our recent decision in *Yes to Stop Calloway Committee*[20] is controlling here. *Calloway* involved a series of spot advertisements pertaining to the desirability of a nuclear plant then under construction. However, unlike *Calloway* and relevant to our determination in this case is the fact that the complainant defined the issue as "the need for, and the desirability of the Calloway nuclear plant." In *Calloway* we held that the licensee was not unreasonable in determining that the need issue was not currently controversial since, at the time the spots aired, construction of the Calloway I nuclear plant had already been authorized by the Missouri Public Service Commission and was substantially completed, the outcome of the generation capacity hearings was uncertain, and there was no evidence which established that such hearings were subject to vigorous debate.[21] However, we emphasized that neither the grant of the requisite authorizations to construct a nuclear

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[19] 49 RR 2d 629 (1981), *review denied*, 90 FCC 2d 648 (1982).

[20] *98* FCC 2d *1317* (FCC 84-118, released August 9, 1984). In its reply, WTVH cited *Times Mirror Broadcasting*, 52 RR 2d 1099 (M/M Bur. 1982), to substantiate its allegation that "SPC . . . failed to demonstrate that the 'debate' over rising costs of the Nine Mile II plant is tied to a specific request for a rate increase." This decision was a preliminary ruling of the Mass Media Bureau and was supplemented by the Bureau's ruling of July 19, 1983 (appended to the August 9 decision). This in turn was affirmed by the Commission and is the subject of this paragraph.

[21] *Fairness Report*, 48 FCC 2d at 12.

plant nor the commencement of construction on that plant was determinative as to the controversiality of the issue. We based our determination regarding licensee unreasonableness on the fact that the complainant had failed to provide evidence of vigorous debate in the community on the issue of the need and desirability of the Calloway nuclear plant *at the time the spots were aired.* Here, complainant has provided substantial evidence to show that the issue of whether Nine Mile II is a sound investment was controversial when the ads were broadcast. Given these facts, our decision in *Calloway* is not dispositive.

21. As to the public importance of the issue addressed in the announcement, the complainant asserts that "[t]he continually escalating costs of the plant will raise utility rates dramatically; the current estimate is 12 to 13%; [and] . . . the utilities will pass extra expenses to stockholders as well." According to SPC the latest cost estimate, and by no means the final one since completion is three years away, is $4.2 billion, about $4 billion in excess of the original estimate. WTVH provides no information to negate these allegations. Rather, it merely alleges that at the time of the broadcast no rate increase was pending. However, based upon the information provided, we cannot reasonably conclude that because no rate increase was pending at the time of the broadcast, the escalating costs of the project will not be reflected in future rates. See Exhibit 1 of complaint (newspaper articles). Furthermore, in view of the fact that future rate increases would reflect present escalating plant costs, waiting until the rate hearings, at which time all of the escalating costs would have been incurred, would be futile. Where, as in this case, the impact that an issue is likely to have on the community involved is substantial, as evidenced by the effect this project will have on ratepayers and stockholders, it could not be reasonably concluded that the issue is not one of public importance.[22]

22. In sum, it is evident that each of the advertisements directly addresses the question of whether continued construction was desirable by citing either the need for electricity or the elimination of foreign oil dependency as problems to be resolved by this construction and that the licensee was unreasonable in concluding that the announcements failed to take an obvious and meaningful position on a controversial issue of public importance.

23. As noted above, there is no mathematical formula or mechanical requirement for achieving fairness. *See Mid-Florida Television Corporation*, 40 FCC 620, 621 (1964). However, there are a number of factors that

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[22] *See Public Media Center*, 59 FCC 2d 494 (1976), *recon. denied*, 64 FCC 2d 615 (1977), *remanded*, 587 F.2d 1322 (1978), *on remand*, 72 FCC 2d 776 (1979).

are relevant considerations in determining whether a "reasonable opportunity" has been afforded for the presentation of contrasting viewpoints on the subject controversial issue of public importance.[23] We have stated that in order to determine whether an unreasonable imbalance exists, three factors must be considered - (1) the total amount of time afforded to each side, (2) the frequency with which each side is presented, and (3) the size of the listening audience during the various broadcasts.[24] By applying these to the facts of a particular case, we determine "whether the public has been left uninformed."[25] An unreasonable imbalance in the presentation of contrasting views result "from the sheer weight on one side as against the other."[26] We will not apply formulae so specific and detailed that they can lead to excessive intrusion into licensee judgment. Within this framework, we now analyze the reasonableness of the actions of the licensee.

24. SPC claims that the licensee did not afford, or plan to afford an opportunity for the presentation of the viewpoint that the building of the Nine Mile II plant is *not* a sound investment. WTVH responds to these allegations by maintaining that, assuming SPC's issue was a controversial issue of public importance, it has provided a balanced overall coverage of the issue of "the efficacy of continued construction" of the Nine Mile II plant.[27] In support of this assertion WTVH has furnished material purporting to show that it had provided coverage of both the anti-nuclear and pro-nuclear viewpoints.[28] It claims that this programming has resulted in a balanced coverage of the issue, even if the total advertisement time is counted. However, a careful review of the record indicates that most of the media coverage documented by the licensee involved the

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[23] *Id.*

[24] *Fairness Report*, 48 FCC 2d at 17.

[25] *Green v. FCC*, 447 F.2d 323 (D.C. Cir 1971).

[26] *Public Media Center*, 59 FCC 2d at 519.

[27] *See* paragraph 8, *supra*. Also, it should be noted that it appears from the licensee's pleadings that this formulation of the issue is similar to if not the same as SPC's formulation.

[28] The licensee's February 3, 1984 reply contained the following titles of programming broadcast which it alleged fulfilled its obligation to present the anti-Nine Mile II viewpoint.

"Transporting radio active matter Route 81"

"Dispute Route 81 radioactive shipment"

"Localities prohibits nuke routes"

"Plans for made attack"

"U.S./European tour stop makes"

"Nuke war critic in town"

"The Day After" preview

general issue of "nuclear power," which is not the specific issue discussed in the advertisements. We have stated that when general topics are involved, a complainant must specify the particular aspect which was discussed.[29]
This is precisely what SPC has done. On the other hand, WTVH has relied upon material which discussed a general issue. Such programming does not satisfy a broadcaster's obligation to present contrasting views on a particular issue. With this in mind, we can only consider material on the specific "sound investment" issue. The record shows that the total time allocated to the viewpoint, "Nine Mile II is a sound investment," was more than 187 minutes, which includes approximately five minutes of news stories and the 182 minutes of paid advertising. When compared to the total time allotted to the contrasting view, approximately 22 minutes, the result is a ratio of more than 9:1 in favor of the "sound investment" viewpoint.[30] Furthermore, with respect to the frequency, the pro-Nine Mile II viewpoint was broadcast 261 times, while the anti-Nine Mile II viewpoint was broadcast 20 times, for a ratio of approximately 13 to 1.[31] In addition, the pro-Nine Mile II spots were broadcast throughout the day, and a substantial number were apparently aired during prime viewing hours. The licensee alleges that its overall programming is not imbalanced, regardless of the total amounts of time allotted to each viewpoint, because a large portion of the pro-Nine Mile II programming was commercial time. It explains that "[a]s a general principle, the public is more likely to place credibility in the information it receives from news stories and public affairs programming than it does in commercial." However, as we stated above, generally, the factors considered to determine whether an unreasonable imbalance exists are (a) total time allotted; (b) frequency of broadcast; and (c) the sizes of the listening audiences (see paragraph 23, above). These factors do not include the type of program broadcast. In the past, we have not distinguished between news programs and other programs in determining whether there was balanced overall programming. We see no reason to make such a distinction here. Therefore, although there is no "mathematical formula"

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[29] *See American Security Educational Foundation v. FCC*, 607 F.2d 438 (D.C. Cir. 1979) (en banc); *Hakki S. Tamimie*, 42 FCC 2d 876 (B/c Bur. 1973).

[30] See attachment II, a listing of anti-nuclear power stories, and Attachment III, a listing of pro-nuclear power stories. We have marked with an asterisk those stories which clearly discussed the Nine Mile II issue and which we considered in reaching our determination. It should be noted that on August 7, 1984, the licensee filed a list of news stories, broadcast since its February 3, 1984, response, in order to notify us of its "continued . . . broadcast coverage" on the Nine Mile II cost issue. However, we could not determine from the titles what viewpoint was discussed. Therefore, this list was not considered in our decision.

[31] *Id.*

for achieving fairness, the imbalance in the amount of time and the frequency given to one side of the issue in this case forces us to conclude that the licensee has failed to afford a reasonable opportunity for the presentation of viewpoints contrasting to those presented in the advertisements and, thus, has failed to assure that the public was not left uninformed.[32]

Conclusion

25. For the reasons set forth above, we are unable to conclude that WTVH has acted reasonably in fulfilling its obligations under the Fairness Doctrine with respect to the issue of "whether the Nine Mile II plant is a sound investment for New York." Accordingly, IT IS ORDERED that WVTH inform the Commission within 20 days of the date of the release of this document of the manner in which it intends, consistent with the principles discussed above, to meet its Fairness Doctrine obligations with respect to the issue addressed in the subject advertisements.[33]

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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[32] *Green v. FCC*, 447 F.2d 323 (D.C. Cir. 1971); *Public Media Center*, 72 FCC 2d 776 (1979).

[33] Supplemental letters were filed by SPC and WTVH (*see* footnote 30, *supra*) on July 3 and August 7, 1984, respectively. We do not believe that the material therein would change the outcome of this ruling.

ATTACHMENT I

ANNOUNCEMENT A-I

Winner/Wagner & Associates, Inc.

CLIENT: Nine Mile Co-tenants
TITLE: "A Leader" NM-03
FORMAT: TV : 60
DATE: June 22, 1982 *FINAL*

VIDEO:	*AUDIO:*
	ANNOUNCER: V.O.
Open with map (outline) of New York state. Aerial shot of state Capitol comes full screen from center of map.	New York state.
Dissolve to map. Aerial shot of university comes full screen from center of map.	A leader in education.
Dissolve to map. Aerial shot of farmland comes full screen from center of map.	A leader in agriculture.
Dissolve to map. Shot of trucks on highway comes full screen from center of map.	A leader in commerce.
Dissolve to map. Dissolve to various shots of OPEC meeting.	And unfortunately, a leader in dependence on costly, unreliable foreign oil.
Flip to aerial shot of NM2. Dissolve to aerial shot of hydro plant. Dissolving to aerial shot of coal train. Dissolve to man caulking window.	To break that damaging dependence, our state has adopted an Energy Master Plan which calls for increased use of nuclear hydro, coal and conservation to eliminate millions of barrels of foreign oil each year.
Dissolve to aerial pan of NM2.	A key part of the state's energy plan is the new Nine Mile Point nuclear energy plant ...
Dissolve to blue screen. "200,000,000.00" comes full screen from center. "Every Year" then wipes on.	which alone will replace over 200 million dollars worth of oil every year.

ANNOUNCEMENT A-II

CLIENT: Nine Mile Co-tenants
TITLE: "Foreign Oil" NM-01
FORMAT: TV :30
DATE: June 22, 1982 *FINAL*

VIDEO:	*AUDIO:*
	ANNOUNCER: V.O.
Open with pullback shot from deserted factory. "For Rent" sign visible. Dissolve to man walking by stores, with "No Help Wanted" signs, etc. in windows, looking depressed.	Dependence on costly, unreliable foreign oil has severely damaged our economy, weakening industry and costing us jobs.
Flip to map (outline) of New York state. Workers come full screen from center of map. Freeze on workers.	Energy independence is an essential step toward revitalizing our State's economy.
Dissolve to map. NM2 comes full screen from center of map. Aerial pan of plant.	The new Nine Mile Point Nuclear energy plant will replace 5 to 8 million barrels of oil, worth over 200 million dollars every year.
Dissolve to title:	
NINE MILE POINT	Nine Mile Point . . .
Flip to:	
A SOUND INVESTMENT	a sound investment for New York's future
The Energy Assoc. of N.Y. State & your local electric company at bottom of screen on both titles	

ANNOUNCEMENT A-II

CLIENT: Nine Mile Co-tenants
TITLE: "Foreign Oil" NM-01
FORMAT: TV : 30
DATE: June 22, 1982 *FINAL*

VIDEO:	*AUDIO:*
	ANNOUNCER: V.O.
Open with pullback shot from deserted factory. "For Rent" sign visible. Dissolve to man walking by stores, with "No Help Wanted" signs, etc. in windows, looking depressed.	Dependence on costly, unreliable foreign oil has severely damaged our economy, weakening industry and costing us jobs.
Flip to map (outline) of New York state. Workers come full screen from center of map. Freeze on workers.	Energy independence is an essential step toward revitalizing our State's economy.
Dissolve to map. NM2 comes full screen from center of map. Aerial pan of plant.	The new Nine Mile Point Nuclear energy plant will replace 5 to 8 million barrels of oil, worth over 200 million dollars every year.
Dissolve to title:	
NINE MILE POINT	Nine Mile Point ...
Flip to:	
A SOUND INVESTMENT	a sound investment for New York's future
The Energy Assoc. of N.Y. State & your local electric company at bottom of screen on both titles	

ANNOUNCEMENT A-III

CLIENT: Nine Mile Co-tenants
TITLE: "Jobs" NM-02
FORMAT: TV :30
DATE: June 22, 1982 2*FINAL*

VIDEO:	***AUDIO:***
	ANNOUNCER: **V.O.**
Open with employment office sign. Dissolve to dejected man leaving employment office with sign in window "No Job Openings." He walks toward camera. Freeze on his face.	**New York state's economy is in trouble. People are being laid off. Hundreds of business failures statewide. 700,000 people out of work.**
Shot of factory worker comes full screen from center of previous shot. Worker throws switch. Slow zoom to CU. Using video effect, scenes changes to various factory shots of people working.	**We need to revitalize our state's economy Electricity is indispensable to industry and vital for jobs. The new Nine Mile Point nuclear energy plant - called for in our state's Energy Master Plan - will provide needed electricity.**
Dissolve to title:	
NINE MILE POINT	**Nine Mile Point . . .**
Flip to:	
A SOUND INVESTMENT	**a sound investment for New York's future**
The Energy Assoc. of N.Y. State & your local electric co. at bottom of screen on both titles.	
Dissolve to people in office checking figures on computers.	**State auditors are on-site making sure that construction is completed at the lowest possible cost.**
Dissolve to *USNRC* seal. Dissolve to architects and engineers inspecting blueprints.	**The NRC ensures that architects and engineers comply with the strictes health and safety standards.**
Dissolve to title:	
NINE MILE POINT	**Nine Mile Point . . .**
Flip to:	
A SOUND INVESTMENT	**a sound investment for New York's future**

The Energy Assoc. of N.Y. State
& your local electric co.
at bottom of screen on both
titles.

ATTACHMENT II

WTVH-
Syracuse, NY
ANTI Nuclear Power stories

Date	Story/Newsmaker	WTVH-NEWSCENTER 5 1200-1230 pm	600-630 pm	1100-1130 pm
1/16/82	Nuke weapon freeze of C.N.Y./Wortley		:50	
*1/18/82	9 Mile 2 cost & complt hearing		:40	
1/27/82	RGE removal of emer team	1:20		
*1/27/82	PSC 9 Mile 2 hearings made public			:25
1/27/82	Hearings complete project 9 Mi 2/Pooler	:35		
1/27/82	Allowing NiMo finish 9 Mi 2/Pooler		1:10	
1/28/82	NYPIRG upset over warning sys	1:30		
1/28/82	NYPIRG upset over evac plans		:55	
1/29/82	Ginna search for leak	:45		
1/29/82	Search for leak at Ginna			:20
1/30/82	Ginna workers ready reenter		1:45	
1/30/82	Workers reenter Ginna			:35
1/31/82	Ginna reenter radioac.levels		:35	
2/1/82	Found leak at Ginna		:30	
2/1/82	Workers no reentry at Ginna			:45
2/2/82	Ginna workers delay entry	:25		
2/2/82	RGE delays in repairs		:50	
2/2/82	Ginna workers enter bldg			:50

Date	Story/Newsmaker	WTVH-NEWSCENTER 5 1200-1230 pm	 600-630 pm	 1100-1130 pm
2/3/82	Ginna busted tube caused leak	:35		
2/3/82	Ginna tube ruptured		:30	
2/3/82	Ginna leak confirmed			:20
2/4/82	Ginna tube break caused leak	:25		
2/6/82	9 Mi 1 accident minor			*
2/6/82	Cleanup at 9 Mile 1		:40	
2/8/82	Ginna emer pump delayed	:20		
*2/9/82	React Nine Mile 2 compl decision		1:35	
*2/10/82	Nine Mile 2 completion OK	:20		
2/10/82	Ginna definate tube brk	:15		
*2/10/82	Nine Mile 2 not that great/W Cahill			1:35
2/11/82	Ginna no startup next wk	:20		
2/12/82	Ginna defects found	:30		
2/12/82	Ginna serious defects found		:30	
2/12/82	Ginna serious defects found			:30
2/13/82	Fiber optic test finds damage			:35
2/20/82	Transporting radioactive mater Rt 81		:35	
2/20/82	Dispute Rt 81 radioactive shipment			:30
2/21/82	Localities prohibit nuke routes			1:00

		WTVH-NEWSCENTER 5		
Date	*Story/Newsmaker*	*1200-1230 pm*	*600-630 pm*	*1100-1130 pm*
*2/23/82	Controlling Nine mile 2 cost/PSC		:30	
2/26/82	More steam escaped than reported	:30		
2/27/82	Bubble kept from state officials		*	
3/2/82	Repair work continues/Ginna	:30		
3/4/82	Review action PSC and NiMo/Fink			1:40
3/8/82	Removed ruptured pipe/Ginna		:30	
3/9/82	Tubing pieces removed/Ginna		:30	
3/9/82	Plans for nuke attack/Pirro		1:25	
3/9/82	Plans for nuke attack			:25
3/9/82	Ginna tubing removed			:30
*3/12/82	Nine Mile 2 poss abandoned next few yrs/ NRC			:30
*3/13/82	Nine Mile 2 may be cancelled		2:30	
*3/18/83	? over Nine Mile 2 approval		:30	
3/19/82	Closed door hearings/Ginna		:30	
3/22/82	US/European tour stop nukes/Kent			1:15
3/23/82	Re-inform police re toxic xport/Sanford		:30	
3/23/82	Radioactive leak Nine Mile 1/Kaish			1:45
3/24/82	Nuke xport in rural comm/Abrams	:30		

Date	Story/Newsmaker	WTVH-NEWSCENTER 5 1200-1230 pm	600-630 pm	1100-1130 pm
3/23/82	Live Eye Nine Mile 1 out 1 yr/Kaish		2:00	
3/24/82	Nine Mile 1 down for 1 yr/Kaish			1:40
3/24/82	Ginna tubing caused rupture			:15
3/24/82	Nine Mile 1 shutdown/power bills	:35		
3/24/82	Nine Mile 1 investigation continues	*		
3/25/82	Indian Pt off line			1:30
3/29/82	Search for power begins		:30	
6/26/82	Nuke war critic in town/Redlenu		1:40	
6/29/82	NiMo cited 2 violations at 9 Mi 1		:30	
7/6/82	xporting nuke waste/Hoffman			1:30
7/7/82	Protesting Nuke xport	:55		
7/9/82	NRC probes supplies to 9 Mi 1		1:30	
7/12/82	Nuke waste transport	1:15		
7/12/82	Fitzpatrick poss 2 wk shutdown	:25		
7/14/82	Fitzpatrick back on line 2 days		:30	
7/26/82	Nuke evac plan for C.N.Y.		1:15	
8/2/82	Nuke xport new regulations		:30	
*8/5/82	9 Mi 2 plnt removes safety systems/K Burstein			1:10

		WTVH-NEWSCENTER 5		
Date	*Story/Newsmaker*	*1200-1230 pm*	*600-630 pm*	*1100-1130 pm*
*9/4/82	9 Mi 2 may have problems		1:30	
9/6/82	Nuke waste xport still issue/Save River	:30		
9/18/82	Nuke waste xport still topic		:30	
*9/27/82	9 Mi 2 taking 2nd look at costs		:35	
10/1/82	9 Mi 1 will remain off line 1 more yr	:30		
10/1/82	9 Mi 1 has real problems/Kaish		2:10	
7/8/82	Nine Mile advertisements/Pooler		2:10	
8/27/82	Arabs upset w/NiMo ads/Zogby	1:20		
9/13/82	Arab still upset Ni Mo ads/Zogby		1:40	
11/24/82	Arab American & NiMo ads/Zogby		1:35	
*10/5/82	New cost overruns 9 Mi 2/Kaish		2:00	
10/7/82	Fitzpatrick plant down/Pooler			:30
*10/15/82	9 Mi 2 welds faulty/Kaish		1:40	
10/18/82	Live Eye Nuke Truck Rt 81		1:30	
10/22/82	Nuke disarm top subject/Sanders		1:20	
10/24/82	Nuke Freeze Movement		1:45	
11/8/82	Nuke arms race convention		1:25	
11/19/82	Port Byron nuke rally/Coombs		1:00	

		WTVH-NEWSCENTER 5		
Date	*Story/Newsmaker*	*1200-1230 pm*	*600-630 pm*	*1100-1130 pm*
11/19/82	Bishops react to nuke weapons/Harrison		1:20	
12/12/82	Zimmer on nuclear Freeze/Zimmer			1:00
12/16/82	Protest on Cruise/Peace Council		1:05	
12/18/82	Protest on Cruise Missle/Buffington			2:15
12/27/82	Religious group want nuke freeze/Wiggins		1:30	
*1/1/83	9 Mi 2 still controversial/Pooler		1:15	
1/9/83	Fitzpatrick down			:30
1/18/83	Nuke plant 3rd shutdown/Fitzpatrick		2:30	
2/2/83	9 Mi Gone to $4.2 billion		:30	
2/2/83	RG&E blamed for shutdown/Ginna		:30	
2/15/83	Actress supports disarmament/Dewhurst			1:35
2/27/83	Shutdown for dirty air filter/Fitzpatrick		:30	
*2/26/83	New probe into 9 Mi 2/ITT Grinnel			:30
3/15/83	Shipping nuke wastes safely/Beach	1:05		
3/15/83	Radioactive water spill/9 Mile 1		*	
3/16/83	Cleanup begins after minor spill/9 Mile 1	:20		
3/25/83	Grinell Singled out in report/NiMo		1:00	
3/28/83	3 Mi Island 4 yrs after		1:50	
3/31/83	Worker falls in reactor pit/Ginna	:30		
4/21/83	what to do with nuke wastes		1:25	
5/16/83	Pt. 1 "Will I grow up"/Nuke series		2:50	
5/17/83	Pt. 2 " " " " " "		2:45	

		WTVH-NEWSCENTER 5		
Date	*Story/Newsmaker*	*1200-1230 pm*	*600-630 pm*	*1100-1130 pm*
5/18/83	Pt. 3 " " " " " "		*	
7/14/83	NRC to shut down 5 plants	2:00		
*7/28/82	Leak in pump system shut down/9 Mile 2		1:15	
7/28/83	Problem in 350 pipe supports/Fitzpatrick	:30		
*8/2/83	Residents voice concern /9 Mile 2			1:35
10/7/83	Fined $40,000 for violations/9 Mile 1			:30
*11/3/83	9 Mi 2 Cheaper to Complete/Pooler		1:30	
11/14/83	Missiles arrive in England/Cruise			2:00
11/15/83	Local protest to cruise/Peace Council			:25
11/15/83	Protest of cruise missile/England			1:10
11/15/83	"The Day After" preview			:55
11/21/83	Kids react to "Day After"		2:00	
11/21/83	Expert react to "Day After"/Cooke		1:10	
11/22/83	Local react to "Day After"	1:15		
12/18/83	N.Y.S. fins plans a waste of time/Nuke plan		1:35	
	Total	20:00+	73:45+	32:30+

*exact duration not presently available

ATTACHMENT III

WTVH-
Syracuse, NY
PRO nuclear power stories

		WTVH-NEWSCENTER 5		
Date	*Story/Newsmaker*	*1200-1230 pm*	*600-630 pm*	*1100-1130 pm*
1/25/82	Full power for plant OK/Ginna	:25		
1/25/82	Ginna pos on line 6/1		:30	
1/27/82	Ginna nuke plant less leak thought	:35		
1/28/82	Ginna workers may return	:20		
1/28/82	RG&E (Rochester Gas & Electric) levels normal		:35	
2/5/82	NiMo downplay 9 Mile 1 accident/Kaish		1:00	
*2/9/82	Completion of 9 Mile 2 OKd		1:20	
*2/9/82	Nine Mile 2 gets OK			:30
*2/10/82	Nine Mile 2 completion OK	:20		
*2/10/82	Nine Mile 2 reaction go ahead		1:40	
2/16/82	Ginna fiber optics test complete	:25		
2/19/82	Ginna back on line May		:35	
2/19/82	Ginna back on line early May			1:30
2/20/82	Ginna back on line May		:25	
2/20/82	Ginna back on line early May			:20
2/20/82	Proposed festival angers Ed/Nowakowski		1:35	

		WTVH-NEWSCENTER 5		
Date	*Story/Newsmaker*	*1200-1230 pm*	*600-630 pm*	*1100-1130 pm*
3/12/82	Fitzpatrick plant back on line			:15
3/18/82	Control crew acted correctly/Ginna		:30	
3/24/82	Ginna back on line May 1		:30	
3/26/82	Should know how to replace power	1:25		
3/26/82	2 wks before NiMo power replacement		1:20	
3/26/82	Poss 2 wks before replacement power			:50
4/1/82	Power Pool Figures		1:30	
4/1/82	Nuke Arms/Freeze/Reagan		1:25	
5/10/82	Proposed nuke bailout /Reagan		1:40	
5/22/82	Lower power startup for Ginna			:30
6/17/82	No new nuke plants planned/Donlon	1:10		
*6/23/82	Protest in support of 9 Mile 2		:35	
6/29/82	Nuke freeze wrong reasons/Fergurson		2:10	
7/27/82	8/11 Oswego Co nuke drill day		:30	
7/28/82	Nuke plan in Utica	:40		
8/3/82	Fitzpatrick plant nuke drill/Brower		2:00	
8/11/82	Fitzpatrick nuke drill	:35		
11/5/82	Live Eye NiMo 9 Mi 1 costs/Kaish	2:00		
11/16/82	Fitzpatrick plant OK/Wright		1:40	

		WTVH-NEWSCENTER 5		
Date	*Story/Newsmaker*	*1200-1230 pm*	*600-630 pm*	*1100-1130 pm*
11/20/82	Seneca Falls nuke drill/Freedland		1:45	
12/1/82	NiMo wants help to fight		1:20	
12/7/82	Westmoreland for MX/Westmoreland		1:20	
12/8/82	NiMo const probe/Kaish			1:10
12/16/82	Cruise missle at Griffitho (AFB)	:40		
12/16/82	Fitzpatrick shut-down minor		:30	
*1/6/83	Good works for 9 Mi 2:	:15		
3/28/83	3 day seminar on nuke power /Mideletown	:50		
4/13/83	Nuke freeze put on hold		:45	
6/9/83	Plant will remain in operation/Indian Pt		:30	
7/5/83	Back on line after year/9 Mile 1	:45		
7/14/83	Nuke plants tested for safety		1:20	
7/18/83	Proclaims nuke power safe/Walske	1:15		
9/28/83	Disaster drill a success/9 Mile 1	:30		
	Total	12:10	27.40	7:00

Re: Complaint of Syracuse Peace Council, FCC-84-518, Released December 20, 1984

DISSENTING STATEMENT OF COMMISSIONER MIMI WEYFORTH DAWSON

I respectfully dissent from the majority's finding that the Syracuse Peace Council has raised a prima facie case of a fairness doctrine violation.[1] In my view, the *Majority Decision*, by rejecting the licensee's definition of the "issue" presented in the subject advertisements and by reaching to find evidence of controversiality, represents a substantial and unexplained departure from consistent Commission precedent.

Licensee Discretion in Defining the Issue

The majority does not dispute that historically the Commission has given broadcasters great discretion in defining fairness doctrine issues.[2] In fact, the majority, citing *Environmental Defense Fund,* 90 F.C.C.2d 648 (1982) [hereinafter *EDF*], even reaffirms that "unless the facts are so clear that reasonable people could not differ . . . a licensee's characterization of a broadcast will govern." *Majority Decision* at para. 15; *see also* paras. 11, 14.

Curiously, however, the majority is not willing to give WTVH(TV) this discretion. The licensee defined the issues discussed during the advertisements as "the need to eliminate the dependence on foreign oil" and "the need for electricity." *Majority Decision* at para. 13. Yet, the Peace Council and the Commission majority insist that the ads were meaningful presentations on the issue of "whether the Nine Mile II plant is a sound investment for New York." *Majority Decision* at paras. 2, 15.

This wide divergence of opinion as to the identification of the "issue" in the ads is wholly understandable, given the advertising copy. From the copy it is clear that the ads discussed several topics. *Majority Decision* at Attachment 1. The bulk of the references to the Nine Mile II nuclear plant are contained in the ambiguous "tag" lines of each ad suggesting that Nine Mile II is a "sound investment for New York's future." Otherwise, the ads talk about any number of energy-related subjects, including "dependence on costly, unreliable foreign oil" and the production of "needed electricity."[3]

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[1] Syracuse Peace Council, ___ F.C.C.2d ___ (1984) [hereinafter *Majority Decision*].

[2] A long line of Commission precedent gives the licensee wide latitude in this regard. The Commission, in outlining this approach, has stated that

> [i]n passing on any complaint in this area, the Commission's role is not to substitute its judgment for that of the licensee as to . . . decisions, but rather to determine whether the licensee can be said to have acted reasonably and in good faith.

Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 40 F.C.C. 598, 599 (1964). *See* Mid-Florida Television Corporation, 40 F.C.C. 620, 621 (1964). This discretion has also been recognized by the courts. *E.g.,* Democratic National Committee v. Federal Communications Comm'n, 460 F.2d 891, 903 (D.C. Cir.), *cert. denied,* 409 U.S. 843 (1972). *See also infra* note 4.

Given the text of these ads, I cannot find that the only obvious "issue" presented is whether the subject nuclear plant is a "sound investment" for New York. It seems to me that, in the words of the Commission's traditional standard, reasonable minds could — and, in fact, do — differ as to the "issue" presented in the advertisements, and, thus, it is difficult for me to find that the licensee has been unreasonable in its characterization of the "issue" presented by the ads. Moreover, the ambiguity of the ads is not clarified by the majority's unexplained assertion that the licensee's interpretation "simply falls beyond the bounds of a licensee's wide zone of discretion." *Majority Decision* at para. 15.

By this decision, the Commission is not allowing the broadcaster reasonable discretion in defining the issue. The standard in finding a violation is not that the members of the Commission or the Peace Council would define the issue involved in ads differently from the way the licensee would define the issue. It is enough that the licensee's interpretation is not absolutely unreasonable, and this should end the Commission's inquiry.

Evidence of Controversy

Even conceding that the Peace Council's definition of the issue in this proceeding is correct, however, I believe that the majority misallocates and misapplies the Peace Council's burden to show that the identified issue was "controversial" and of public importance. It is important here to note that it is not the licensee's obligation to show the lack of controversiality or public importance. Likewise, it is not the Commission's duty to read between the lines or assume that a particular issue is controversial. Rather, it is the complainant's burden — and, by design, it is a substantial burden — to demonstrate the existence of a vigorous debate with substantial elements of the community in opposition to one another. *Fairness Report,* 48 F.C.C.2d 1, 12 (1974).[4] In determining whether an issue is controversial, the Commission has said "it is highly relevant to measure the degree of attention paid to an issue by government officials, community leaders, and the media." *Fairness Report,* 48 F.C.C.2d at 12. But, as WTVH correctly cites in its answer, "[m]erely because a story is newsworthy does not mean that it contains a controversial issue of public importance." *Answer of Meredith Corporation* at 10 (Feb. 3, 1984), *citing Healey v. Federal Communications Commission,* 460 F.2d 917, 922 (D.C. Cir. 1972).

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[3] *Majority Decision* at Attachment I. Announcement A-I mentions education, agriculture, commerce, dependence on foreign oil, New York's Energy Master Plan, hydro-electric and coal-fired generation of electricity, conservation, and the Nuclear Regulatory Commission's health and safety standards. Announcement A-II mentions dependence on foreign oil and New York's economy. *Id.* Announcement A-III mentions New York's economy, unemployment, business failures, the indispensability of electricity, and New York's "Energy Master Plan." *Id.* Nevertheless, the majority accepts the Peace Council's naked assertion "that the advertisements 'obviously and meaningfully' present one side" of one issue. *Majority Decision* at paras. 3, 15.

[4] American Security Council Education Foundation v. Federal Communications Comm'n, 607 F.2d 438, 446 (D.C. Cir. 1979) ("[T]he complainant must produce prima facie evidence of a violation before the broadcaster will be burdened with establishing compliance with

Inherent in this burden is the element that evidence of controversiality be reasonably contemporaneous with the broadcast of the subject advertisements. It seems clear to me that an issue which is subject to vigorous debate within a community at one point in time may not be so at another point. And it would be fundamentally unfair to broadcasters for us to assume otherwise. This requirement of timeliness is recognized in Commission precedent[5] as well as by the majority in this case.[6] It also seems necessary to note that likewise inherent in the complaint's burden

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the fairness doctrine."), *cert. denied,* 444 U.S. 1013 (1980); 607 F.2d at 453 (Wright, C.J., concurring) ("To preclude the possibility of . . . a chilling effect . . . the FCC has constructed a formidable procedural barrier, but one that is not insurmountable to complainants with legitimate fairness doctrine claims."); National Broadcasting Co. v. Federal Communications Comm'n, 516 F.2d 1101, 1121 (D.C. Cir. 1974) ("A substantial burden must be overcome before the FCC can say there has been an unreasonable exercise of journalistic discretion in a licensee's determination as to the scope of issues presented in the program."), *vacated as moot,* 516 F.2d 1180 (D.C. Cir. 1975), *cert. denied,* 424 U.S. 910 (1976); Yellow Freight System, 73 F.C.C.2d 741, 755 n.11 (1979) ("We . . . feel that a substantial burden must be satisfied before a licensee's judgment should be overturned in Fairness Doctrine matters . . .."); Handling of Public Issues under the Fairness Doctrine, 58 F.C.C.2d 691, 696 (1976) ("As part of the allocation of burdens and responsibility among complainants, licensees and the Commission, the initial burden has been placed on the complaining party."); Media Access Project, 44 F.C.C.2d 755, 758 (1973) ("Both the Commission and the courts have held that . . . the burden is on the complainant . . ."); Allen C. Phelps, 21 F.C.C.2d 12, 13 (1969) ("Absent detailed and specific evidence of failure to comply with the requirements of the fairness doctrine, it would be unreasonable to require licensees specifically to disprove allegations . . ..").

[5] For example, in *EDF,* the Commission dismissed the complaint in part because the complainant failed to furnish the Commission with "any evidence to show that the issue received any attention from local community leaders, local public officials or local media *at the time . . . the advertisements were broadcast.*" 90 F.C.C.2d at 661 (emphasis added). Likewise, in Yes to Stop Callaway Committee, 98 F.C.C. 2d *1317* (1984) [hereinafter *Callaway*], the Commission found that the issue specified by the complainant was not "subject to vigorous debate in the St. Louis community *at the time the subject spots were aired.*" 98 F.C.C.2d at ___ [para. 17] (emphasis added).

[6] The majority recognizes "that an issue that was once controversial and of public importance may no longer be so because of the passage of time," *Majority Decision* at para. 18, and, in fact, the majority distinguishes *Callaway* by saying that there the complainant "failed to provide evidence of vigorous debate . . . *at the time the spots were aired,*" *Id.* at para. 20 (emphasis in original).

is the requirement that the evidence of controversiality be relevant to issues identified by the complainants.

The evidence in this case, as furnished by the complainant, presents neither a vigorous debate nor an involvement of substantial elements of the community at the time the ads were broadcast. The majority and the Syracuse Peace Council base their finding of controversiality on: (1) the submission of six newspaper articles; and (2) the allegation that 20,000 signatures were collected on petitions directed to the New York Public Service Commission regarding the cost of the plant.[7]

Yet, this "evidence" virtually disappears under close examination. For example, of the six newspaper articles, three were published approximately six months after the advertisements were broadcast, one was published approximately eight months after the ads ended, and one ad, although published only two weeks after the ads completed their run, dealt not with the controversiality of Nine Mile II, but with the controversy regarding the broadcast of the ads themselves. Only one of the articles, published about a month and a half before the ads began to run, seems at least arguably both relevant to the issue identified and reasonably contemporaneous.

Under consistent Commission precedent, this showing of media coverage is woefully inadequate to demonstrate the existence of a controversy concerning the cost-effectiveness of the Nine Mile II plant at the time the subject advertisements were broadcast. Indeed, this case stands in stark contrast to two of the Commission's most recent cases in this area, *Callaway* and *EDF*.

In *EDF*, a fairness doctrine complaint was brought against several California television stations regarding a power utility's advertising that was claimed to advocate a position on how northern California's future energy requirements should be met. 90 F.C.C.2d at 649-50, 654. The complainant submitted 12 newspaper articles as well as a written summary of a report from the President's Council on Environmental Quality in order to show the controversiality of the alleged issue. 90 F.C.C.2d at 650-51. Yet, the Commission rejected most of the purported evidence because, except for one article, the clippings provided by the complainant either failed to directly discuss the issue defined in the complaint, or were published about a year after the advertisements were broadcast. 90 F.C.C.2d at 661.

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[7] *Majority Decision* at paras. 16-17. There is also some evidence regarding a second petition campaign. Those petitions, on which the majority and the Syracuse Peace Council rely, state in part the petitioners' solidarity with the "efforts of the Syracuse Peace Council and the Consumer Protection Board of the State of New York to insure that the contrasting points of view be presented [on WTVH] about the Nine Mile 2 nuclear power construction project." *Complaint* at Exhibit 1. There is evidence of television coverage of the alleged "issue" in 1981, *Complaint* at Exhibits 2 and 3, but the majority does not seem to rely on this coverage, *Majority Decision* at paras. 16-17.

The same analysis holds for *Callaway.* That case involved power company advertising on KTVI(TV), St. Louis, concerning ongoing construction of a Missouri Nuclear power plant. 98 F.C.C.2d at ___ [para. 4]. Petitioners there presented eight newspaper articles, one newspaper editorial, one newspaper letter to the editor, and two paid newspaper advertisements. 98 F.C.C.2d at ___ n. 11. Of these, all except the editorial were either irrelevant to the issue identified by the complainant or uncontemporaneous with the broadcast of the advertisements. 98 F.C.C.2d at ___ - ___, [paras. 17-20, 23].

As with *EDF,* I can find no significant difference between the evidence presented in *Callaway* and the evidence presented in the instant case. Yet, despite their remarkable similarity, the outcome of the cases are widely different, and the majority provides little analysis to distinguish the two cases, other than the majority's conclusory statement that in *Callaway* the complainant "failed to provide evidence of vigorous debate . . . *at the time the spots were aired,*" while in the present case the Syracuse Peace Council *has* provided "substantial evidence." *Majority Decision* at para. 20 (emphasis in original).

But perhaps most disturbing of all is the majority's apparent treatment of the petitions before the state PSC. As indicated above, the Syracuse Peace Council, in an effort to show the controversiality of the advertisements at the time they were broadcast, states, without further support, that petitions containing 20,000 signatures had been filed before the New York Public Service Commission questioning the cost-effectiveness of the Nine Mile II plant and in response to the PSC's consideration of continued funding for the plant.[8] Yet, the majority neglects to note that the PSC, *several months before the ads were broadcast,* had rejected the position reflected in the petitions and had effectively reapproved construction of the Nine Mile II plant. *Complaint* at Exhibit 1. Thus, as WTVH has pointed out, there was no proceeding pending before the PSC concerning the plant (or even concerning electric rates in general) at the time of the broadcast of the ads. *Answer* at 12-13.

Remarkably, the exact fact pattern formed the basis for the Commission's denial of a fairness doctrine complaint in *Callaway.* There, the Missouri Public Service Commission had approved the construction of the Callaway plant before the broadcast of the ads. *Callaway* at para. 21. And this Commission, in finding that the licensee was thereby reasonable in determining that the ads were not controversial because the issue "had already been resolved" by the Missouri PSC proceeding, stated that even if the "need would again be at issue in those future hearings, we have no basis in the evidence to find that the licensee was unreasonable in concluding that there was *no sustained controversy over need through the entire period of construction.*" *Id.* (emphasis added).

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[8] Interestingly, the Peace council does not seem to place great reliance on this petition campaign. In fact, the petitions do not seem to be mentioned in any of the Peace Council's pleadings; rather, the only reference to them appears to be in correspondence between the Peace Council and WTVH, which was submitted along with other correspondence in Exhibit 2 of the complaint.

Yet, the majority in this case wholly rejects the *Callaway* approach and simply *assumes* that the cost-effectiveness of Nine Mile II remains controversial throughout the construction of the plant. As the majority puts it, "the issue of the economic soundness of an ongoing project, which could be halted at any time, may be relevant for the entire life of the project." *Majority Decision* at para. 18.

Not only does this eagerness to *assume* controversiality throughout the construction of a nuclear plant work an unwarranted and unexplained reallocation of a fairness doctrine complainant's burden,[9] but it is directly at odds with a similar factual situation in *Callaway.* In fact, I can simply find no way of distinguishing *Callaway* from the instant proceeding, and I can find no basis for taking the unprecedented step of assuming that a nuclear plant is a controversial issue throughout its construction. If the Commission wishes to find that some issues are controversial no matter what the evidence presented by complainants, thus reversing decades of Commission precedent, I believe it is incumbent on the Commission to state why it is changing its precedent. Not only is this explanation required to pass judicial muster, *Greater Boston Television Corp. v. Federal Communications Commission,* 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied* 403 U.S. 923 (1971), but I also believe that an explanation is required out of fairness to our licensees because it is virtually impossible for a broadcaster to read the instant case and *Callaway* and know what its responsibilities are under the fairness doctrine.

Accordingly, I respectfully dissent from the majority's decision.

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[9] *See supra* note 4 and accompanying text.